In the Supreme Court of the United States.

OCTOCER TERM, 1875.

THE TWIN LICK OIL COMPANY, OF WEST VIRGINIA, *Complainant, Appellant.*
vs.
WILLIAM MARBURY, *Appellee.*
No. 69.

BRIEF FOR APPELLANT.

This cause comes up by appeal from the Supreme Court of the District of Columbia.

The complainant, a company chartered under the laws of West Virginia, filed a bill against the defendant, one of the directors, to declare him trustee of and compel him to reconvey to the complainant, a tract of land and other property of the complainant, which he had purchased at a sale made under a deed of trust which had been executed by the company, complainant, to secure a loan of the defendant, and, also, to have an account taken of the profits realized by him from the property while in his possession

Record, pp. 1 to 3.

The court below dismissed the bill, and the complainant appealed to this Court.

Record, p. 112.

The Case.

In the year 1866 several persons, principally residents of the District of Columbia, associated themselves together

for the purpose of obtaining and working an oil well in West Virginia.

Rec., p. 68.

They purchased a lease of a certain tract, being one of a great number of tracts owned by the Volcanic Company; the tract in question being known as lease No. 36. Ib.

The lease had been made to George Jackson, October 30, 1865, and the rent reserved was one-fourth part of the oil produced. The tract was almost an exact square of 99 yards.

Record, p. 5, fol. 17.

George Jackson assigned to John C. Marbury, Wm. D. Colt, Bernard G. Wilson and Oscar R. Hough, November 25, 1865, reserving for himself one-eighth of the oil produced.

Record, p. 8.

In January, 1866, the defendant, Dr. Marbury, bought an interest in the lease, one-sixteenth, others had previously bought, and those interested in January, 1866, were William D. Colt, J. Carter Marbury, Oscar R. Hough, B. G. Wilson, John T. Cochran, W. T. Hough, W. N. Lloyd, C. H. Slicer.

A well had been begun on the property and put down to 226 feet when, in April, 1866, the tools became fast and the well had to be abandoned. The parties became discouraged, and assessments could not be collected without difficulty.

Then Hough, at his own expense, commenced a new well, put it down 240 feet, at an expense of $1,960, paid from his own pocket, and obtained a large flow of oil, estimated at 100 barrels per day.

Hough continued in charge till September, and was reimbursed for his outlay by sales of oil and by assessments.

In September the associates formed a corporation under

the general corporation act of West Virginia, for the purpose of producing and selling coal oil.

Their capital stock was $25,000.

Amount paid in, $4,000.

The incorporators were:

John T. Cochrane, one-fourth.

Wm. D. Colt, one-fourth.

J. Carter Marbury, one-fourth.

Wm. Marbury, one-eighth.

Jordan Stabler, one-eighth.

They, however, were named because they were present in West Virginia, and they held in trust for those really entitled.

The company being organized, appointed one Slicer superintendent, and commenced selling oil.

A new well was commenced in December, 1866, or January, 1867, and again a large flow of oil was obtained, said to be 200 barrels.

J. C. Marbury, Rec., pp. 69–70.

It was, however, neglected by the superintendent, (who was incompetent, if not worse,) and was greatly injured.

Ib.

At this time, February, 1867, the officers of the company were five directors, viz.: William D. Colt, who was also president; Jordan Stabler, who was also secretary and treasurer; and J. Carter Marbury, William Marbury, and Oscar R. Hough.

Rec., p. 93.

The company not being able to tube the well, and being in debt, at a meeting of the directors an assessment of $1,600 was ordered, and by a resolution Dr. William Marbury was requested to endeavor to borrow $2,000 on a mortgage of the property and a pledge of the stock of the company.

Rec., p. 93.

Instead of borrowing the money, the defendant lent it himself, having first visited the property to satisfy himself of its value, taking the note of the company at ninety days, dated February 15, 1867, secured by a deed of trust to William H. Thomas.

Well No. 2, falling off in production, the board ordered No. 1 to be deepened. In doing this the tools got fast and so remained.

They were extricated and the well completed about June 15.

W. Marbury, Rec., p. 82.

Allen's Letters, Rec., pp. 53, 55.

The other well was yielding from ten to fifteen barrels a day. A contract was soon after made to have it pumped on shares, *i. e.*, for one-half the oil remaining after payment of the royalty. This contract ended July 10.

Rec., p. 55.

Stabler, in the spring of 1867, at the period of greatest depression, borrowed for the company, upon his own responsibility and without any security, about the same sum of $2,000, of which he obtained reimbursement afterwards by sales. (Stabler, Rec., p. 26.) Marbury alone, for a similar advance, required security, and ultimately took the whole property of the company.

On the 10th day of July, 1867, at the request of the defendant, Thomas, the trustee, sold the entire property of the company at auction for $1,100. It was bought by one R. E. Colt, ostensibly for himself, but really as the agent for Dr. Marbury, the defendant, and was by deed of same date, conveyed to him, Colt as the successful bidder joining in the deed.

Rec., p. 13.

About August, 1868, the defendant discovered that two

wells called the Warner wells, which had been supposed to be on the adjoining property, was really on lease 36.

W. Marbury, Rec., p. 85.

He at once brought suit against the former oil company for trespass. He also informed J. C. Marbury of the discovery, Rec., p. , who had a stockholder's meeting called, at which three-fourths of the stock was represented, including J. C. Marbury and William Marbury. It was there ordered that the secretary prepare a statement of the facts for opinion of counsel; and as Dr. Marbury had then brought suit against the Warner company, it was agreed to await the result thereof.

J. C. Marbury, Rec., p. 74.

No report was ever made of the result of the Marbury suit. Rec., p. 102.

It was in fact compromised by an agreement, under which Dr. Marbury received some leases, of which the value is not known. His claim was for $15,000. (Rec. p. 75, fol. 265.) Jackson, who, having sold one half of his royalty, was still entitled to one-sixteenth of the oil pumped on lease 36, received for his claim $3,000, which would indicate that the value of the oil pumped from the complainant's property through the Warner wells, was at least $48,000, of which the company's share, after the payment of royalty, was five-eighths, or $30,000.

In the following year, 1869, Dr. Marbury deepened one of the wells sunk by the company, and obtained a flow of oil which yielded him $30,000 or $40,000 in one year, 1870, and $15,000 or more the next year.

His deposition, Rec. p. 86.

On the 10th of April, 1871, the bill was filed to declare the property held by Dr. Marbury in trust for the company, and to compel him to convey the same to the company for an amount.

Record, p. 1–3.

The grounds on which the bill proceeded were:

1. That the resolution of the directors constituted the defendant their agent to borrow the money, whereas he became the lender.

2. That he controlled and directed the sale and mode of sale.

3. That by the interposition of Colt as nominal purchaser, he concealed his acts in the premises.

4. That it was not made known at the sale that the Warner wells were on the property, and that the defendant, a director of the company, and secretary and treasurer then, present at the sale, was grossly negligent of his duty, in not having ascertained the fact before the sale and made it known.

6. That the defendant was not only a director of the company, but treasurer of the company at the time of the forced sale, and had, and availed himself of, his special knowledge thus acquired and not possessed by others, in bidding for the property.

7. That the defendant, by his declarations to the other stockholders, had led them to believe that he had bought the property for their benefit, or simply to save his debts, which tended to prevent them from taking means to examine into the transaction, and look after their own interests.

The answer of the defendant denied the capacity of the company to sue; 1st, because he had purchased the franchise, and, 2d, because the company had suspended operations for more than two years, and had thus become dissolved.

He denied that he was ever secretary and treasurer of the company.

He denied that he controlled the sale.

He denied that the employment of Colt was a contrivance to cover the fact that he intended to purchase, and alleged that his intention to buy, if necessary, had been

made known to most of the stockholders and acquiesced in by them.

He denied that, as director or secretary and treasurer, he had become acquainted with the business of the company, and had means of taking advantage of its necessities or took such advantage, or that he forced a sale at a time favorable to his purposes.

He denied that he knew the Warner wells were on the property, or that it was his duty to know it, or that they were of the value alleged, or more than about $1,500 or $2,000; and he denied that he received the issues thereof for the time alleged, but only since May, 1870; and he averred that he bought the property according to its ostensible bounds, and that on the whole the new boundaries are not more valuable than the old.

He denied that he ever made any representations to the stockholders that he would purchase, or had purchased, for the benefit of any of them, or used equivocal language, or made any representations which tended to prevent them from examining into the circumstances of the sale, &c.

And he generally averred that in all things he acted in good faith; that he paid full value for the property; developed it and made it valuable by his capital, &c.

Testimony was taken, the cause heard, and the court dismissed the bill.

Assignment of Error.

1. The court erred in dismissing the bill.

2. The court ought to have granted the relief prayed on the following grounds:

1. The deed of trust was executed not in pursuance of the resolution of the Board of Directors, and so without authority; that resolution authorized a deed to secure a loan to be negotiated by Dr. Marbury. His judgment and knowledge were relied on by the company to secure

proper terms for the benefit of the company. To the contrary of this his judgment and knowledge were not exercised in the interest of the company, but in the interest of the lender. The terms of the deed were disastrous to the company, as will be hereinafter shown.

2. The defendant fixed the time of the sale and controlled the same, and selected the newspapers in which the same was to be advertised.

3. The defendant failed to cause the sale to be made in conformity with the deed of trust in that thirty day's notice was not given.

4. The defendant failed to cause the leased land to be pointed out to the buyer; on the contrary, it was incorrectly marked and the marks excluded a valuable portion thereof.

5. The defendant at the time of sale was a director of the company, and its secretary and treasurer. He cannot hold the property so purchased against the company.

Complainant's Evidence.

I.

One of the issues of fact made by the pleadings is the allegation made in the bill that Dr. Marbury was a secretary and treasurer of the Company at the time of the sale, and for some time before and after the sale.

Bill, part 8, Rec., p. 2.

In his answer he says it is untrue that he was at any time secretary and treasurer of the company, and that if ever elected, it was without his knowledge or consent.

Answer, part 8, Rec., p. 16.

In a letter of Dr. Marbury to Mr. Stabler, dated July 20, 1867, he says:

"DEAR STABLER: There was a meeting of the board of directors of the Twin Lick Co. Saturday night; all present except yourself. I tendered my resignation as secretary

and treasurer, which was accepted, and O. Hough elected to fill the place. * * The reason why I resigned was that property now being in my name, and the royalty not being paid, I was afraid of complication with the Volcanic. There might possibly be a rupture if not an eruption.

Record, pp. 48, 49.

Stabler testified that he was secretary and treasurer, resigned in June, 1867, and was succeeded by Dr. Marbury.

Record pp. 24, 25.

Hough testifies that he succeeded Marbury.

Record, p. 34.

The defendant denies that he was a director for from some time prior to February, 1867, to some time subsequent to June, 1867.

Answer, part 8, Record, p. 16.

He was elected a director December 27, 1866.

Minutes, Rec. p. 59.

He was acting as such Feb. 1, 1867.

Minutes, Rec., p. 58.

And February 16, 1867.

Minutes, Rec., p. 59.

And January 26, 1867.

Minutes, Rec., p. 60.

And January 31, 1867.

Minutes, Rec., p. 60.

And July 22, 1867.

His letter, Rec., pp. 49, 50.

II. *That Dr. Marbury, the defendant, directed and controlledthe sale.*

The deed of trust provides that if the note be not paid then the trustee, on the demand in writing of the person holding the said note, shall offer the property for sale, first giving at least thirty days notice thereof in such newspaper as shall be designated by the company.

Record, p. 12, folio 39.

Thomas, the trustee, testifies:

"I was the trustee that made the sale of the Twinlich property in West Virginia. I was called upon by Dr. Marbury who held the deed of trust against the company, in writing to sell. I advertised the property in the usual way in Baltimore, Philadelphia, and Parkersburg. I gave all the papers to Mr. Marbury, (defendant) including the letters to me asking me to sell, and copies of the advertisements. I consulted with the Doctor or his brother as to what papers I should advertise in. Either I or Carter Marbury drew the advertisements, in Carter Marbury's office, I think. * * The property was sold for cash. I suppose the deed of trust fixed the terms of sale. I don't know, however.

We tried to do every thing legally. I advised with no other besides Dr. Marbury and his brother, Carter Marbury, about it. * * I suppose we had several conferences prior to the sale in the office of Carter Marbury. I met Dr. Marbury several times. * *

Cross-examined: "Q. In what character was J. Carter Marbury consulted by you?

"Ans. I don't know who he represented."

Rec., pp. 41, 42.

June 14, 1867, the defendant wrote to Stabler: "I hope something may turn up to obviate the necessity of selling

out. I have not yet advertised, but will do so next week. in the Baltimore Sun, Parkersburg Times, and Philadelphia Inquirer. Mr. Thomas sent the advertisement to the Sun, and requested to know the cost, and they informed him that the charge would be $18.75, three insertions a week for four weeks. It is nearly double what the National Intelligencer would charge. I wrote my nephew, in Baltimore, to see if it could not be done for less, but have not heard from him yet. * * * I expect to sell out the concern about the 10th of July next, but have not determined yet exactly the day."

Rec., p. 50.

He did sell, on the 10th of July, (Record, p. 13,) and as no advertisement had been made and no time fixed for the sale, as late as the 14th of June, it is certain that the provisions of the deed of trust were not complied with, which required "at least 30 days previous notice." (Deed of Trust, Rec., p. 12, Folio 39.) Not more than 26 days' notice could possibly have been given.

The purchase was made through an agent, and not directly. Thus the sale had the appearance of having been a *bona fide* sale to the highest bidder, and the stockholders were given to believe that D. Marbury held a title thus acquired, and that he had not himself bought the property. How much effect this had in producing apparent acquiescence cannot be known. That it tended to produce such acquiescence is undeniable; and such interposition is discountenanced by the law, in every case where the right of a party to purchase may be drawn in question, on grounds personal to himself.

By the code of West Virginia, Chap. 72, Sec. 7, before any sale under a deed of trust, notice must be posted at least thirty days prior thereto on the front door of the court house, &c., and a copy served on the grantor or his

agent, if he be in the county at least twenty days before the sale.

The company had an agent in the county. Slicer had been superintendent; Jackson succeeded him January 19, 1867, Rec., p. 57, and continued till after the sale. It does not appear that any notice was ever served on him.

The burden of proof is on the defendant to prove the fairness and validity of the sale.

The code of West Virginia contains the following provision:

Code, Chap. 87. Fiduciaries generally:

SEC. 3. Every fiduciary shall, within four months after selling any property as such, return to the said clerk or recorder an account of such sales.

And when sale of personal property is made under any deed of trust otherwise than under a decree then within six months after the sale shall be returned by the trustee to the receiver of the county where the said deed may have been first recorded, an inventory of the property sold and an account of the sales. Any trustee failing to comply with this section shall forfeit his commissions on such sales.

Every inventory and account of sales returned under the two preceding sections shall be recorded by the recorder or clerk to whom the return is made.

No such account or inventory was ever filed.

J. C. Marbury, Rec., p. 75, fol. 267.

Wm. Marbury, Rec., p. 95, fol. 344.

III. *The condition of the property when sold.*

At the time of sale the one of the wells called in the correspondence No. 1, was pumping little but water. J. C. Marbury and W. Marbury, Rec., pp. 51, 72. But with good prospect. Rec., p. 55.

The other was being pumped on shares, and yielded 10 to 15 barrels per day.

Rec., p. 51.

The contract for pumping on shares was made to test the well without expense to the company; the contract and test ended on the day of sale, July 10.

Rec., p. 55.

On the 12th of August the well was yielding 10 barrels per day.

Rec,, p. 55.

Oil was then, in July, very low; $2 per barrel at the well. (Rec., p. 81.) Thirty days after, August 17, the price had advanced to $3, a few months latter to $4, and next summer to $10.

Rec., pp. 56, 94.

June 10, 1867, Harris making an offer to pump the well on shares, said "this well is paying too well to let her stand still," and again repeating the offer June 16, he says:

"The way things is carried on, it would break up any company. This is the best location in the State."

Rec., p. 57.

Allen, an engineer in the service of the company, writes June 14, 1867:

"I do think the new well is as good a well as there is on Twin Lick if that water can be got rid of." (He then describes the mode of excluding the water, and continues:) "I am certain there is plenty of oil there if we can manage any way of getting it out. I will make this proposition: I will take the well as soon as Harris' contract is over (Jones, 16, Rec., p. 57), and pump it 10 days for $100, and if I don't get more than 100 barrels of oil I will charge nothing for my labor. Just pay other expenses, or I will have it pumped that way now if you will say so."

Rec., p. 54.

IV. *The real opinion of the defendant as to the value of the property.*

On the 26th of January, 1866, the defendant offered $200 for Benjamin Wilson's share, which was one-sixteenth (Rec., p. 65), and to assume his assessments.

On the 26th of January, 1866, he purchased a part of the royalty reserved on the lease, being a one-sixteenth of the product.

March 21, 1867, he had offered $400 for another part of the royalty and hoped it could be procured, and then contemplates some further arrangement.

Letter to Slicer, Rec., p. 52.

April 23, 1867, intends to have the property sold if note be not provided for.

Letter to Stabler, Rec., p. 56.

At sale he was willing to give $2,500 for it.

Rec., p. 23.

What necessity was for the sale?

The capital stock of the company was $25,000, of which $9,600 had been called in, leaving $15,400 uncalled. Of the stockholders, eleven-sixteenths were "good and prompt;" four-sixteenths "good but slow," and one-sixteenth not good. Record, p. 65. An assessment properly assessed would no doubt have brought the money; if not, the stock could have been sold, and thus the delinquents only lost their property.

Having the responsibility of all these stockholders and the property besides, as security for his loan, he proposed to take the property and release the stockholders; for he says he intended to bid the full amount of his loan.

Record, p. 97.

Proceedings at the sale.

T[illegible]as, the trustee, says:

"We read the advertisement and sold everything as it stood, including machinery, well tools, &c. There might have been a little oil in the tank in hand, but I did not see any of consequence. * * * I gave no notice of the sale except by the advertisements I have referred to. I advertised in Parkersburgh, as that was a kind of headquarters for oil men. * * * The property was all in sight of the company present at the sale. Nothing was told about the limits of the lease except what appeared in the advertisement. There were some two or three bidders. It was started at $500 and run up to $1100, at which sum it was struck off. The two wells on the property were pointed out to the bidders, and no other wells were pointed out save those on the property. I had never been there before. One of the two wells was down about 400 feet; they were both in a deep ravine where a man could hardly walk. One was low down and one about 40 feet above it; both were on the side of the hill. There were two engines, one at each well. One was borrowed and did not belong to the company and was not sold. They were small engines, say about eight or ten-horse power; besides, there were some tubing-tools of not much value, and a small tank; if there was any tank sold at the railroad station, I don't know of it. There was no other property sold that I know of."

Rec., p. 42.

Carter Marbury testifies:

"The different property belonging to the company consisting of one steam engine, two or three tanks and a lot of old tubing, and the lease itself, were pointed out to the bidders. Besides Dr. Marbury, George Jackson, Mr. Thomas and myself, among those present, I recollect Col.

R. E. Colt, Richard Joyce, Allen, before spoken of, John Freeborn, superintendent of the adjoining lease, and, I think, a Capt. McGuire. The first bid was made by Freeborn and was $500. The bidding was carried on by Colt, Dr. Marbury and myself, and at $1100 was knocked down to Colt."

Rec., p. 72.

"Question. What did you consider was sold at the time of sale?

"A. Everything owned by the company in West Virginia. I mean by that its franchises, the lease, stock of oil on hand, tubing, tanks, engines, &c.

Rec., p. 77.

The defendant testifies:

"I went out to attend the sale with Mr. Thomas, the trustee, timing our departure from Washington so as to reach the wells on the morning of the sale. Richard E. Colt went with us from Petroleum, where he was then residing. I was then undetermined to buy the property until the morning of the day of sale, although I had entertained the idea of doing so previously, and it was known to all the members of the board of directors that I might bid at the sale. I requested Mr. Richard E. Colt to bid for me, and just before the sale I mentioned to him that it was my intention to invite certain members of the company to participate with me in the working of the property. In other words, it was my wish and purpose to form a new company, to be based upon the debt which the company owed me. At the same time I felt myself at liberty to invite other members not connected with the company, should I become the owner of the property. The well "No. 2" was pumped just before the sale, the different property belonging to the company, pointed out by the trustee, and the sale commenced. There were present on that occasion Mr. William Thomas, John Freeborn, George Jackson, George W. Allen, Rich-

ard J. Joyce, J. Carter Marbury, Richard E. Colt, another man, whose name I do not know, and myself. There might have been others, but I do not recollect any others.

The first bid was &500.00, and was made by Freeborn, and after bidding by several parties, it was struck off to Richard E. Colt. Mr. Richard E. Colt assigned to me the purchase, and Mr. Thomas, the trustee, made the conveyance to me after we returned to Washington city."

* * * *

"Q. Did you bid at the sale before it was struck off to R. E. Colt?

A. I did.

Q. Who told Freeborn to start the sale at some price?

A. I did not hear any one tell him to bid at all, nor did I know that he was going to bid.

Q. Was the sale ever reported to any court?

A. It was not. I never was aware that any such thing was required."

* * * *

"Neither had I, nor do I know that any member of the company, any idea that the location of the Warner wells belonged to the Twin Lick Co. when the mortgage was made. It was not known at the time of the sale, to myself, or to any one, that I know of; not to the trustee or to any one. * * At the time of the sale the Warner Oil Co. had possession of the wells. The highest bona fide bid was $1,000, I think; I don't remember by whom. I, myself, bid for it, intending to run it up to the amount of my debt of $2,000, but stopped on considering that it would be paying so much more in commissions. All the lines of the lease were visible at the place of the sale. Stakes marked the corners. I am not sure all the stakes were standing, but some of them were. The Warner wells were not within the stakes of Twin Lick lease. If it had been known that the Warner wells were included in the sale, I don't know that it would have brought much more, because they could not be pumped,

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as there was a clause in the leases, that no well could be pumped within two rods of the dividing line. The Warner wells did not interfere with the Twin Lick wells at that time."

Rec., pp. 82, 83, 95, 97.

R. E. Colt testifies:

"I bid off the property at that sale. There were no other bids that I recollect. I bid it off at the instance of Dr. Marbury. I was staying at Petroleum, about three and a half miles from this property. I had seen an advertisement for the sale of this property. Dr. Marbury and his brother came to me before the sale and Dr. Marbury had a talk with me about bidding off the property. This was the evening before the sale. According to my recollection from the notice of sale, the sale, as I understood, was to be made to pay certain indebtedness of the company, for the amount due on a second engine and oil tank. It was to be sold on an execution, if I recollect aright. When I say second engine, I mean the one at the second well, the first having been paid for. I asked the doctor why he did not pay up the indebtedness and go on with the business, and not have the property sold? His reply was, that he proposed to take this course, which would compel certain parties to pay up who had not paid or forfeit their interest in the property. He spoke of a man by the name of Ben. Wilson particularly as not having paid, and one other, whose name I do not recollect. But the balance of the company would remain as before, they reimbursing the doctor for the amount bid on the sale. The doctor wished me to bid off the property in my name, and assign it to him for the benefit of the company. I supposed the doctor was taking it for the benefit of the company, the main object being to compel delinquents to pay up or forfeit their interest. As I understood him, he proposed to reorganize the company so as to get rid of delinquents. I knew Dr. Marbury was a director of the com-

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pany, and I supposed he was acting as its agent. I do not definitely recollect anything further that was said at that time."

* * * *

"I do not remember as any means were taken to point out the property. We were on the property at the time of the sale. The notice of the sale of the property, I think, was read. This, I believe, contained a general description of the property. I do not remember as anything was said as to extent or value of the property. I understood the extent and nature of the property sold. There were two wells and two engines on the property, and a number of tanks, &c.

Rec., pp. 21, 22.

V. *As to the representations made by the defendant, calcu lated to mislead the stockholders and prevent examiuation.*

The sale was made on the 10th of July. On the 20th of July Dr. Marbury attended a called meeting of the board of directors, and the minutes contain the following entry:

"Dr. Marbury made a statement of his doings while at the well, as follows: That George Jackson was employed as superintendent, at the rate of $1,000 per year, and G. W. Allen and Harris as engineers, at the rate of $2.25 per day. That under this superintendence the well is now being worked."

Record p. 34, 66.

Hough testifies to the same statement.

Record, p. 34, fol. 115.

On the 20th of July, 1867, he writes to Stabler that he has resigned the office of secretary and treasurer, because the property is "now in my [his] name."

Record, p. 50.

On the 24th of July, 1867, he writes to Stabler, on business of the Twin Lick Company, about sales of oil, &c., and continues right along: "I had a letter from Sanger this morning. He has been pumping since last Wednesday nothing but water, except Sunday, when the Valentine stopped. The Twin Lick then colored up some but when the Valentine commenced again on Monday it went back to nearly pure water. I think we will have to put it down deeper, but will pump a week longer. The engine at the upper well (borrowed) was sold at sheriff's sale last Friday, and Jackson suffered Ben Wilson to buy it in at $310. I am afraid I will be put to great inconvenience by this, though Wilson told Jackson he might have the use of the engine to test the well."

Record, p. 51.

It is certain that the defendant gave out that he did not expect to hold the property alone, but that other stockholders should in some way have some rights even if only a right to acquire an interest; and there was some understanding to this effect with Stabler at least.

Colt knew

See Stabler to ~~defendant~~, ~~March~~ 2, 1867, Rec., p. 61.
Defendant to Stabler, June 14, 1867, Rec., p. 50.
Same to Same, July 6, 1867, Rec., p. 51.
Same to Same, August 17, 1867, Rec., p. 57.
Colt's testimony, Rec., p. 22.
Jackson's testimony, Rec., p. 99.

As to his offer to let in other Stockholders:

He say the parties to whom he made the offer were Hough, Carter, Marbury, Colt and Stabler.
Rec., p. 96.

All these were directors who were equally with himself disqualified to take the property.

He made the offer to none of the other six stockholders, and when those to whom he made the offer, that is the other directors, declined, he considered the offer closed and determined to carry on the hazardous enterprise alone, then gave power of attorney to Jackson to represent him.
Rec., p. 84, fol. 302.

The power of attorney is dated August 30, 1867, so that the defendant did not wait the 60 days.
Rec., p. 111.

VI. *The law of the case.*

In Drury *vs.* Cross, 7 Wall., 299, the court said:

"The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable and without authority of law. It was their duty to administer

the important matters committed to their charge for the mutual benefit of all parties interested, and in securing an advantage to themselves not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties entrusted to their management, *with absolute fidelity* to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had endorsed."

In the York and Midland Railroad Company *vs.* Hudson, 16 Beav., 485, the master of the rolls said:

"I have come to the conclusion the *directors* are persons selected to manage the affairs of the company for the benefit of the stockholders; *it is an office of trust.* A resolution by shareholders, therefore, that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees. When, therefore, shares are left at the disposal of directors, they cannot directly or indirectly derive any personal advantage directly or indirectly from their disposal."

This case is cited in 25 Beav., 586, by the master of rolls, where he says:

"In fact, there is no mode by which any species of sale or dealing between the company and one of its directors can be made valid and effectual, except by bringing the circumstances attending it fully before a general meeting of the shareholders and first obtaining their sanction to the trancaction."

In the Luxembourg Railroad Company *vs.* Sir William Magnay, 25 Beav., 586, a railroad company furnished a director with a large sum of money to enable him to purchase the concession of another line. He purchased it from himself, he being the concealed owner. Held that

the transaction could not stand. Says the master of rolls:

"A director of a joint stock company is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is in all matters entered into in their behalf to be treated as an agent; accordingly, if he enter into any contract for the company he cannot personally derive any benefit from it."

In Aberdeen Railway Company *vs.* Blaikie Brothers, 1 Macqueen, 461. The action was by Messrs. Blaikie, iron founders in Aberdeen, (Scotland,) against the railroad company for performance of contract. The principal defect was, that Mr. Thomas Blaikie, the managing partner of the pursuers, was at the time of the contract a director, and so could not deal in that character with his own firm. The Lord Chancellor said:

"The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of these agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge toward their principal, and it is a rule of universal application, that no one can have a personal interest conflicting with those whom he is bound to protect. *And no question is allowed to be raised as to the fairness or unfairness of such a contract.*"

In 32 L. J., ch. 54, *ex parte* Hill. When a director had advanced money to the company from time to time under an arrangement for receiving a bonus or commission of 6d. per ton on the amount of produce sold by the company, their Lordships said it required no statutory enactment to invalidate a contract between a director of a company for his own benefit with the company, and that the claim for commission could not be allowed.

"A trustee cannot, under any circumstances, be allowed to deal with himself on behalf of the *cestui que trust*, surreptitiously and without his knowledge and assent. It is immaterial that he may take no advantage from the bargain. It may be that the terms on which he attempts to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better, but so inflexible is the rule that no inquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act has a tendency to interfere with the duty of protecting the trust estate which the trustee has taken upon himself to perform. The policy of the rule is to shut the door against temptation. It makes no matter whether the transaction relates to real estate or personalty, or mercantile matters, for the disability does not arise from the subject-matter, but from the obligation under which the trustee lies to do his utmost for the *cestui que trust*. It makes no difference in the application of this principle that the sale was by public auction, or that the purchase was made through another person, or that the purchase was made from a co-trustee" &c., &c.

Kerr on Frauds, p 158.

as a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of the sale, can be a purchaser of the property on his own account. And in this case was cited by the court Greenlaw *vs.* King, decided in the court of chancery in England, in January, 1841, (5 Lond. Jur., 18,) where it was decided by Ld. Cottenham that this principle was not confined to a particular class of persons, such as guardians,

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In *ex parte* James, 8 Ves., 337. A solicitor to a commission in bankruptcy was considered to act in such a fiduciary capacity, that the purchase of the bankrupt's estate by him was set aside. Purchase could not be for his benefit. Says the Lord Chancellor, that—

"A purchase by a trustee or assignee, and person having a confidential character, is not permitted in any case, however honest the circumstances, and although the sale was at public auction."

In 1858 it was decided in case of Brown *vs.* the City of Toronto, 11 Moore, 3 P. C., 463, in a suit instituted in a court of chancery, and afterwards taken up on appeal to recover from the appellant the amount of profit received by him from the sale of certain debentures issued on behalf of the city of Toronto, on the ground that the appellant was mayor of the city and one of the council thereof, and a member of the finance committee, and as such the trustee and agent of that city, and therefore incapacitated from deriving a personal profit from their transactions. The court of appeal consisted of chief justice of Upper Canada, the chancellor, chief justice of C. P., and six other judges. Here too it was decided if he was not trustee within the common meaning or popular acceptation of the term, he was substantially so, within the reach of every principle of jurisprudence. He came within the broad rule and principle against trustees purchasing, &c.

In Torrey *vs.* Bank of Orleans, 9 Paige, 663, on an appeal from the decree of the vice chancellor, it was decided as a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of the sale, can be a purchaser of the property on his own account. And in this case was cited by the court Greenlaw *vs.* King, decided in the court of chancery in England, in January, 1841, (5 Lond. Jur., 18,) where it was decided by Ld. Cottenham that this principle was not confined to a particular class of persons, such as guardians,

trustees, or solicitors, but was a rule of universal application to all persons coming within its principle, which is that no party can be permitted to purchase an interest when he has a duty to perform that is inconsistent with the character of purchaser.

It was held, in 11 Paige, 21, that a trustee cannot become a purchaser of the trust property under a prior incumbrance for his own benefit, and to the prejudice of the *cestuis que trust*, without their consent.

The chancellor, in 2 Johnson's Ch., 260, in an exhaustive argument, quoting many cases to support his decision, says: "It is to guard against the uncertainty and hazard of abuse, (in case of purchase by a trustee,) and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and without showing actual injury, and insist upon having the experiment of another sale." Here several decisions which seem to have a contrary effect were commented on, explained, and as far as adverse to the above doctrine, overruled.

The Cumberland Coal and Iron Company *vs.* Sherman, 30 Barb., 553, 571, is a case directly in point. Here it was laid down that an agent cannot purchase the property himself. It goes on to establish that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature towards his principal, and is subject to their diabilities.

Says his honor, Justice Davies, "There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and is subject to the obligations and disabilities incidental to that relation, and to support this are cited: 3 Paige, 222; Angel and Ames on Corp., 258, 260; 3 Louis R., 568; 1 R. I. Rep., 321; 1 Edw., ch. 84; Redfield on Railways, 494; 6 Young and Collyer, 326; 16 Bear., 485, (already referred to;) 1 McQueen Rep., 461." Here it was de-

cided, too, that the duties or obligations of a director or trustee are not altered from the fact that he is one of a number of directors or trustees. The same principle applies as if he was acting as a sole trustee. Farther on it is said: "It is not doubted that the relation of the directors to the stockholders is the same as that of the trustee to his *cestui que trust.*"

In Abbot *vs.* The American Hard Rubber Co., it was decided "that directors of a company with are agents to manage its affairs. The rule of instruction upon the powers of an agent or trustee, invalidate every indirect as well as direct transfer of this trust property to himself or for his benefit. No principle is better settled than that a person having a duty to perform for others, cannot act in the same matter for his own benefit."

3 Paige, 237; 4 Curren, 717; 11 Paige, 21; 3 Paige, 178.

"It requires no authority to establish the fact that the directors of the American Hard Rubber Company could not have transferred the property of the company, directly to themselves or to *a corporation in which they were stockholders and directors.*"

In 1st Edw., Ch. 84, the vice chancellor declares "that when a corporation aggregate is formed, and those composing it place the management and control of its affairs in the hands of a select few, then such directors become the agents and trustees of the corporation, and in their character of trustees are accountable," &c.

In Iddings *vs.* Bruen, 4 Sandf. Ch., 239, 281, the court said:

"A single proposition is sufficient to dispose of all the purchases made by Mr. Bruen, either directly or indirectly. As trustee of the property he could not become its purchaser. He had a duty to perform in regard to it which was wholly inconsistent with his assuming that character.

* * It does not relieve the case from the presumption of wrong that the sale was made under a judgment or decree. There may be instances of that kind in which the court can see that no possible injustice has ensued, and thus be induced to permit a purchase by a trustee to stand."

Iddings *vs.* Bruen, 4 Sandf. Ch., 239, 281.

In Pickett *vs.* School District, &c., 25 Wisconsin, 551, Justice Paine says:

"We think there is one fatal objection to the plaintiff's right to maintain this action, that is, that inasmuch as it appears that the plaintiff was himself the *director of the district* at the time the contract was let, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in antagonistic position, and obtain the contract for himself from the board of which he was a member. No man can faithfully serve two masters, whose interests are in conflict, &c. The same doctrine is applicable to the question of taking a contract as to that of making a sale. Neither are the duties and obligations of a director altered from the circumstance that he is one of a number," &c.

In the case of The Hoffman Steam Coal Company, of Alleghany County *vs.* The Cumberland Coal and Iron Company, 16 Maryland, 456, it was decided on appeal, that the appellee, Sherman, was a director of the company; that such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into any agreement in which he has or can have a personal interest conflicting, or which possibly may conflict with the interests of those he is bound to protect, and no question is allowed to be raised as to the fairness or unfairness of such a transaction. This is a case ably argued and quite decisive of the

law upon the point of directors being considered by the courts as trustees, &c. References to affirm the doctrine there propounded are very numerous. Case decided in 1860.

In Cumberland Coal and Iron Company *vs.* Sherman, 20 Maryland, 118, 127, the parties are the same as in the case above mentioned, but with positions reversed; case decided in 1862. Here it was admitted by Stoughton & Johnson, for appellees, that Sherman, as a director, could not purchase so as to bind absolutely the stockholders. From this decision we learn: "That in this State, (Maryland,) as elsewhere, it is well settled that trustees purchasing at their own sale, such purchase will be set aside." 3 G. & J., 184. This doctrine, which is applicable to trustees, applies also to purchases by persons acting in any fiduciaay capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. Authorities supporting this will be found in the note in 1 Wh. & Tud. L. C. in Eq., 105.

In Howard, 503, 554, 558, 561, it is held by the court broadly: That a person cannot legally purchase on his account that which his duty or trust requires him to sell on account of another. And a purchase *per imterpositam personam* by a trustee or agent of the particular property of which he has the sale, carries fraud on its face, in view of the maxim *emptor quam minimo potest, venditor vendit quam maximo potest.* 2 Sug. Vendors and Purchasers, 109, Lond. ed., 1824.

In Butts *vs.* Woods, 37 New York, the court carried the doctrine to an extreme, deciding not only that the relation between director and stockholder is that of trustee and *cestui que trust*, but that the director is incapable of voting on a question affecting his distinct interest. And that when a director so situated was necessary to make a quorum, the act of the board would be void.

In this case the defendant was one of the three directors that passed the only resolution authorizing the loan.

As to other principles:

It is the duty of a trustee to get "*all the information possible*" for the benefit of the *cestui que trust*. *Ex parte* James, 8 Ves., 48.

"If a trustee fail to get information which might be procured by diligent inquiry, and on account of this negligence a third party might obtain an advantage in the bargain, equity will not allow the trustee the benefit of his own negligence, in becoming the purchaser of the property,"

Gibson *vs.* Geyes, 6 Ves., 280.

"The defendant is in this situation, being the person who is to acquire the interest, and also the person who is to advise the grantor, *he imposed upon himself the duty of informing himself fully of the value*, and of acting in favor of his employer as adversely against himself as he would against any other person, with whom acting fairly for his employer he was making the best bargain he possibly could."

Harris *vs.* Tremenheere, 15 Ves., 40–1.

"And although the purchaser may not be aware of the duties of giving information, which the court would require in the situation in which he stood, *it is necessary to impute knowledge which the party may not actually have had.*'

Huguenin *vs.* Basely, 14 Ves., 299; see also Farnum *vs.* Brooks, 9 Pick., 212, 234.

"The confirmation of a sale must be the joint act of all; a majority cannot bind the minority; the *cestui que trust* acting *sui juris* must not only be acquainted *with all the facts but apprised of the law, how those facts would be dealt*

with if brought before a court of equity; they must know they are confirming an impeachable transaction."

1 Dart on Vendors, 43.
Lewis on Trust, 615, 664.
1 White and Tudor's Leading Eq. Cas., 136.
16 Md., 509.
20 Md., 117, 134.
2 John's Ch., 264.
30 Barb., 47.
Ex parte Hughes, 6 Ves., 622.
6 Ves., 628.
8 Ves., 353.

"Nor can a ereditor who has been consulted as to mode of sale be a purchaser;" and the trustee who made the sale in this case, testifies that he consulted with the defendant and with his brother, J. Carter Marbury.

Sugden on Vendors, 567, and cases cited.
Michoud *vs.* Girod, 4 Howard, 561.

"And the question of forfeiture cannot be considered in a collateral proceedings; *and no advantage can be taken of any non-user or mis-user on the part of a corporation before judgment of ouster at the suit of the Government.*"

The People *vs.* The President and Directors of the Manhattan Co., 9 Wend., 351.
Bank of Niagara *vs.* Johnson, 8 Wend., 645.
The Rector, &c., *vs.* Lovett, 1 Hall, 191.

"An assignment of all the property of a corporation did not work a disolution as between stockholders."

State of Maryland *vs.* Bank of Maryland, 6 G. & J., 205.

In the Covington and Lexington Railroad Company *vs* Bowler's heirs et al., 9 Bush., 468, a director of a railroad company purchased the railroad belonging to his corpora-

tion, at a judicial sale thereof, without the consent of the corporation, and without the permission of the chancellor by whom the sale was decreed. The sale was reported to and confirmed by the court.

Held, the corporation has a right to have its road surrendered to it, upon placing the director, who purchased it, in *statu quo*. Being a fiduciary the director could not purchase the property of the corporation, even at a judicial sale, without its consent, or without the permission of the chancellor, by whom the sale was decreed.

If an assignee, for the benefit of creditors, sue out a mortgage belonging to the trust, attend the sheriff's sale, under an execution issued by him, and purchase the real estate in his own name, he puys, as trustee for the creditors. If the trustee purchase with an intention to hold for himself, it is a legal fraud.

Campbell *vs.* McLain, 51 Penn. St., 200.

When several trustees are appointed, the property is committed to the charge of all, and the *cestui qui trust* is entitled to the vigilance of all.

Adams' Eq., 58.

The doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, to which he stands in a fiduciary relation, if contested by the *cestui qui* trust, is inflexible without regard to the consideration paid or the honesty of the intent. Public policy requires this not only as a shield to the parties represented, but as a guard against temptation on the part of the representative. The relation, however, must be one in which knowledge, by reason of the confidence reposed might be acquired or power exist to affect injuriously the interest of the *cestuis qui trust*, or advance that of the trustee. The reason of the law is its life, and unless some advantage might be gained by reason of the relation, the principle does not apply."

32 Penn. St. 315–16, Chorpenning's Appeal.

"A private party cannot take advantage of forfeiture resulting from irregularities or departures from the charter in the organization of the company. The courts are bound to regard it as a corporation so far as third persons are concerned until it is dissolved by a judicial proceeding on behalf of the government that created it."

Frost *vs.* Frostburg Coal Co., 24 Howard, 278.
United States *vs.* Williams, 5 Cranch C. Ct., 62.
Angel and Ames on Corporations, sec. 774, and cases cited.

"And the question of forfeiture cannot be considered in a collateral proceeding; *and no advantage can be taken of any non-user or mis-user on the part of a corporation before judgment of ouster at the suit of the Government.*"

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"An assignment of all the property of a corporation did not work a dissolution as between stockholders."

State of Maryland *vs.* Bank of Maryland, 6 G. & J., 205.

VII.

The defendant then in this case, as one of the complainants' directors, seeking to take advantage of his own gross negligence and mismanagement of the company's affairs, sees the embarrassed state of the company, the necessary result of his own mismanagement, and after a full investigation, as appears from his own testimony, decides that he will be abundantly secured. Then taking a further advantage of the embarrassed condition of the company in not disclosing what he ought to have known, whether did or not, and what the law will impute he did know,

has the property struck off to him through the intervention of a third party, whom he has employed and against whom he pretends to be bidding, at a sale which he has principally conducted.

It is respectfully submitted, that apart from all the special facts of this case adduced in favor of complainants' relief, this is a case in which a director has purchased his company's property, and the law will impute fraud and compel restitution.

Conclusion.

We submit that the decree of the Supreme Court of the District of Columbia should be reversed, and the cause remanded with directions to decree a reconveyance and an account.

J. M. CARLISLE,
J. D. McPHERSON,
CHAS. BEASTEN,
Solicitors for Complainant.

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In Supreme Court United States.

Statement and Brief of Appellee's Counsel.

TWIN LICK OIL COMPANY,
vs.
WM. MARBURY.
No. 69.

DAVIDGE AND COX,
of Counsel for Appellee.

R. O. Polkinhorn, Print.

Supreme Court of the United States.

TWIN LICK OIL COMPANY,
vs.
WM. MARBURY.
No. 69.

Statement and Brief of Appellee's Counsel.

In the Fall of 1865, a lease, known as No. 36, of certain lands of the Volcanic Oil and Coal Company, in West Virginia, made by that company to George Jackson, was, by him, assigned to Wm. D. Colt, Oscar R. Hough, B. G. Wilson, and J. C. Marbury. They conveyed certain interests to John T. Cochrane, Wm. T. Hough, W. N. Lloyd, Charles H. Slicer, and Wm. Marbury.

In July, 1866, a well having been struck, the company had a meeting and authorized J. C. Marbury to obtain a charter, which was done. For the sake of convenience the charter was taken in the names of five members who lived in Washington and Baltimore. It was, however, for the benefit of all, and stock was distributed according to the several interests in the lease. At the July meeting, five out of the ten members were elected Directors, and the affairs of the company were managed by them until their property was sold out in July, 1867, except that the President, Mr. Cochrane, having died, late in 1866, Wm. D. Colt was elected in his place, and

Dr. Marbury, the defendant, was elected Director. (Record pp. 68, 69.)

In January and February, 1867, the company were in debt to the amount of some $3,000, and without means. At a meeting held in the latter month, Dr. Marbury was appointed a committee to negotiate a loan of $2,000, upon the security of the company's property, but failed to do so (Id. p. 70), and so reported to the President. He was importuned to lend the money himself, and at first refused, but finally consented, provided he should be satisfied that the property was a sufficient security for the loan, and that the company would pay the expenses of his visit to the property. This was acceded to. He visited the property then for the first time; was satisfied from the representations of the officers in charge that the security was sufficient; paid the $2,000, and took a note at 90 days, and a deed of trust to secure it. (Id. p. 71.) When the note matured, the company were reported by the superintendent to be as much in debt as ever, over and above the amount due to the defendant. (Id. p. 71.) It should be here noted that, under the code of West Virginia, (Corporation, sec. 30,) the Board of Directors can do all things proper to be done by the Corporation.

The note was dishonored. The defendant, after several applications for the money, was informed by the President that the company had no money, and his only recourse was a sale under the deed of trust. (Deft's dep., p. 71.)

He had written to Stabler, Secretary and Treasurer, April 23d, stating that if the parties interested would join in a note to him, or make any arrangement by which the responsibility would be divided, he would not foreclose. (p. 56.)

After waiting about a month for his money, he called on the trustee to sell.

The property was advertised; was put up for sale on the 10th July, 1867, and bought in by the defendant, at $1,100, and, by the trustee, conveyed to him.

In August, 1868, an accidental survey dislosed the fact that a well, which had been worked by the Volcanic Oil Company, known as the Warner well, was really within the lines of this lease, which gave rise to a claim against that company, of which more hereafter. (Id. 85.)

In the spring of 1869 light oil was discovered for the first time in the neighborhood—all the oil theretofore produced having been heavy and lubricating oil.

In May, 1869, the defendant proceeded to bore well No. 1, on this lease, which had been abandoned as exhausted, to the depth of 1000 feet, it then being about 500. In August, a vein of light oil was struck. Up to this time, the defendant had derived no profit from the property, but had expended on it some $3,500, including the payment of an incumbrance, besides his purchase money. (Id. p. 86.)

In September, 1870, for the first time, the defendant was notified of a claim on him by the other members of the old company. (Id. 86.)

This suit was brought in April, 1871, and the bill claims to hold the defendant as trustee for the company, and demands an account of profits from him.

The grounds alleged may be stated as follows, viz:

1. That the defendant, *before*, *at*, *and after* the sale, represented to sundry stockholders, that he was about to purchase, or had purchased, the property for the benefit of all, or certain of the stockholders and in his intercourse with the stockholders, did not claim to have purchased for himself, and used language tending to prevent them from inquiring into the circumstances and taking measures to protect their interests.

2. That after March 13, 1867, and before July 10, 1867, he became the Secretary and Treasurer of the Company, assumed the duties of said office and held it till July 20, 1867; that he was continuously a director from before February to some time after June, 1867; and that by means of said offices of Director, Secretary, and Treasurer, all which he held at the time of sale, he had peculiar means of knowing the value of the property and the business of the company, and taking advantage of its necessities, and had an advantage over other bidders.

3. That the existence of the Warner well on the premises—a fact calculated to affect the market value of the property and the sale—was not made known at the sale, or was concealed, and the defendant either knew or ought to have known it.

4. That the defendant procured R. E. Colt to buy the property in for himself, which was a contrivance to avoid the appearance of purchasing for himself.

5. That the defendant controlled and regulated the sale, and it was made in conformity with his wishes and directions.

These several positions and the evidence in support of them, will be considered in their order.

I

The allegation is that he represented, *not to the plaintiff*, but *to sundry stockholders*, that he was to purchase or had purchased, *not for the plaintiff*, but *for the stockholders, all or certain of them.*

It is not perceived what the plaintiff has to do with representations made to individuals—that would make the defendant a trustee for them. No such facts would sustain this bill.

And even as to the stockholders, what does the allegation amount to? Did they employ the defendant to bid for their benefit? What consideration did he receive for doing it? On what terms was the property to be held for their benefit? What measures did the representations prevent them from taking, and what inquiries would they have made? Was there any agreement to waive any such measures in consideration of defendant's promise to bid in for their benefit?

It will be seen that the proof throws no light on these questions.

But, waiving these questions for the present, what is the proof?

The plaintiffs rely upon several witnesses.

The first witness, Jordan Stabler, says; (Record p. 29) "Dr. Marbury took possession of the property to recover the money he had advanced, after which time, *i. e.* after he should be paid, it was still the property of the company."

Upon further cross-examination, he says: "*It was just the understanding between us,*" "*when the deed of trust was given.*" "*It was simply a verbal understanding.*" (Id.)

Independently of the impossibility of thus refining away a solemn deed by a mere contemporaneous verbal understanding, the statement is absurd on its face. It imports that Dr. Marbury agreed, in taking the mortgage, not only to consider it no mortgage at all, but, by going through the form or farce of a foreclosure, when the note should mature, to put himself in a worse position than he was before, *i. e.*, to become a trustee for the company, on the terms that he was to manage the property at his own costs, and assume all the risk of loss, but if a profit should be made, beyond the payment of his debt, it was to be shared with the company.

The witness admits that he never committed himself to any responsibility for any losses Dr. Marbury might incur, and that neither he or any one else, to his knowledge, offered to share his expenses. (Id. 30.)

It amounts then to this: Before foreclosure, all losses and expenses were shared equally, and the debt to Dr. Marbury was good as long as the property was worth it. After foreclosure, Dr. Marbury was to bear all loss and expense, but the profits were to be shared. The property was off the company's hands as far as sharing losses were concerned, but on their hands still for a division of profits. It is needless to say that the defendant wholly denies any such absurd arrangement, and it is not asserted by any other witness. (Id. p. 84.)

But the witness is flatly contradicted in many particulars and by his own letters.

He denies, on cross-examination, that he was Secretary and Treasury, real or acting, between June and October (Id. 28) or ever made any final report as such; that he considered and dealt with Dr. Marbury as absolute owner of the property (p. 30); that he considered the company bankrupt (p. 20); that he expressed gratification at the Warner well being found on the property, on Dr. M's account, claiming that it was because he regarded it as belonging to the company and expected to be benefited by it. (p. 30.)

In these respects he is contradicted by his own letters, (Exhibits Id. 58 to 65); by his account renderedas Treasurer from July, 1866 to September 25, 1867, (Id. p. 106, deft's dep. p. 79, and Exhibit "W. M. O.,") and by Wilson's deposition, p. 104.

This is all the proof offered as to representations made before the sale.

On the subject of representations made at the sale, the

testimony of Richard E. Colt is relied on. (Id. p. 21.) He says, in substance, that the defendant told him at the sale that this course was taken to compel certain parties to pay up or forfeit their interest, but the company would go on as before, they reimbursing the defendant the amount bid on the sale, the main object being to compel delinquents to pay up or forfeit; and, that the defendant was going to reorganize the company so as to get rid of them. Witness supposed the defendant was taking the property for the benefit of the company. Defendant wished witness to buy in the property and assign it to him, for the benefit of the company.

He admits (Ans. 5) that defendant gave no intimations that there was any arrangement between him and the other members of the company that he should buy in the property; and that the defendant spoke of *reorganizing the company under some new arrangement.* (3d cross-interrogatory and answer.)

This is the whole testimony as to representations made at the sale.

If the testimony were strictly true, it would not sustain the bill, or amount to anything; because the alleged representations were made, not, as the bill alleges, to the stockholders, but privately to defendant's own agent, and not by him communicated to, or acted by, any one. The witness was employed by defendant to buy in the property for him. He was not a stockholder and had no interest in the subject-matter, and, at most, was made the confidant of the defendant's intentions, which he could change at pleasure.

But the memory of the witness is shown to be totally unreliable.

He thinks that the sale took place on the 7th of July; that it was an execution sale made by the sheriff; that it was to pay a debt for a steam engine and oil tank;

that he was the only bidder; that he bid it in for about $400 (instead of $1,100); denies the presence of Thomas, (the trustee), or of Joyce or Freeborn, at the sale; and that the last named bid; and that any description of the property was given.

He is contradicted, as to these particulars, by W. Thomas, (Id. p. 41, &c.,) J. C. Marbury (dep. 15, 17, Id. 72), Dr. Marbury (p. 83), and as to his own statements in conflict with his present testimony, by S. Woodward (Id. 101), and Col. Compton (Id. 106).

On the subject of representations made after the sale, Oscar R. Hough is called.

He testifies (Id. p. 39) that he *always understood* from conversations with Dr. Marbury, after the sale, that he, witness, was liable to the extent of his interest for the expenses of the well; that these conversations took place between the spring of 1867 and the fall of 1868; *that he offered Dr. M. some stock of the Washington Improved Gas Light Company in payment of his share of these expenses.* He admits that, in a legal sense, *he considered the sale valid, and never questioned it*, but from conversations with Dr. M. he understood that his interest was still good, and he bases his claim to recovery in this suit on these conversations, and the fact that he never signed away his interest in the lease. (Id. 39.)

It is to be remarked—

1. That such alleged representations after the sale, if true, would be wholly immaterial. If the sale was valid, there was nothing to be inquired into, and consequently no wrong done by being deterred through such representations from inquiring into the circumstances of the sale.

2. The witness does not pretend, as the bill alleges, to have been misled by these representations, but simply

bases a claim upon them as if they were a contract. The bill takes no such ground, however, and could not, because it would be wholly without consideration.

3. The improbability of the story may be inferred from the fact, that no other stockholder, though others were responsible, and Hough was not, was ever called upon to share Dr. M's expenses or considered himself liable for them. Stabler, as we have seen (Id. 30), expressly repudiates any such obligation.

4. The witness' confusion of mind is further seen in the fact that he claims there never was any valid incorporation of the plaintiff; that he holds his interest as an original proprietor of the ground independent of the company, and yet, also, holds his stock issued to him on the basis of this interest; in other words, claims both above and under the company, and bases his right of recovery in this suit partly on that. (Id. 37.)

5. The witness is contradicted by his own letter (O. R. H., No. 4, p. 67), and by the deposition of Joseph F. Brown (Id. 90), and of Dr. Fenwick (Id. 104). The former shows, that as late as September, 1870, he did not pretend to claim anything from Dr. Marbury in regard to this property; and the latter, that in the winter of 1869–'70, he expressly spoke of Dr. M. as sole and absolute owner.

6. He is flatly contradicted by the defendant and J. C. Marbury, who show that the gas stock was offered, not in payment of his share of current expenses, but for a share in a new company to be organized by Dr. Marbury (Id. 73, 84.)

It appears that Hough never asked, or Dr. M. offered, any account of the expenses (see Hough's deposition), and yet Hough would have us believe that he offered

stock, valued at $3,300, to pay his share of a liability of which he neither knew nor cared to know the extent. (Id.)

The conversations he refers to occurred within a year after Dr. M's purchase, when very little expense had been incurredby him. Hough owning one-eighth, his offer would assume the expenses to have been $26,400, more than seven times as much as Dr. M. ever claimed to have spent for expenses altogether.

7. The unreliability of Hough is further shown in the fact that he swears that he advanced the money to sink the first well—$1,950—while his own book contradicts him, and shows that he received it from assessments.

Dr. Fenwick also contradicts Hough. (Id. 104.)

Mr. Wm. D. Colt, the President, is, apparently, called to testify to this same point.

He says (p. 47), that the Doctor always held him for his proportion of his debt; that he told the Doctor he considered himself responsible; that he has spoken to Dr. M. in regard to his (witness') interest in the Twin Lick property, and told him he considered him indebted to witness, at least in the amount he, witness, had put in.

On cross-examination, however, he admits, that the responsibility which the defendant asserted, and he admitted, was for *the balance of the debt unsatisfied by the sale under the deed of trust* (p. 47), and that the indebtedness which he claimed of the defendant was merely an indebtedness in *equity and justice*, by reason of the defendant's getting the benefit of the outlays made by his associates.

He admits distinctly, that he considered the sale a complete foreclosure and transfer of the property. (p. 48.)

But the conclusive proof as to this witness' views is found in an official letter from him, as President of the

company, to W. S. George, dated February 10, 1868, in which he informs his correspondent that the property had passed out of the hands of the company, and they had no authority or claim in the lease. (p. 49.)

Here, then, are three witnesses—the President, the Secretary and Treasurer, and the former Superintendent and present Secretary of the Company—of all persons the most likely to be well informed about the company's concerns. Not one of them sustains the allegation of the bill, as to the defendant's representations that he was about to purchase, or had purchased, for the benefit of the other stockholders, and each of them puts the right of recovery on a different ground from the others, and from that assigned in the bill.

It is clear, from their acts and writing, long after the sale, that they did not believe Dr. Marbury had bought in on their account, but considered the property absolutely his.

This is further shown by Stiles (p. 88), who was referred by Stabler and others to *Dr. Marbury, as owner of the property, for the settlement of claims against the Twin Lick Company for oil royalty, amounting to* $1,000, *which amount the defendant paid in cash.*

But it is further shown that the company collectively took the same view.

At a meeting of the stockholders held September 9, 1868, at which twelve sixteenths of the stock was represented, and which was called to consider the claim of the company against the Volcanic Oil Company for back profits, it was resolved—Dr. Marbury, present—

"That the attorney of the company be requested to ascertain the amount of oil produced *up to the time the lease was transferred to Wm. Marbury, 10th July,* 1867." (See minutes filed, Record pp. 66, 67.)

Here was an official recognition of the sale to Dr. Marbury, fourteen months afterwards, without an intimation of any claim on him.

And even as late as October 24, 1870, at a meeting in which thirteen sixteenths of the stock was represented, the claim of the company against the Volcanic Oil Company was referred to the Board of Directors, but as yet no claim was set up against Dr. Marbury. Id.

It is therefore plain, from the action of the company, collectively, and of the officers who have testified, that they did not for three years after the sale, consider Dr. Marbury as their trustee.

It is further shown, negatively, from the company's entire abandonment of the business. Between July, 1867, when the sale was reported to them, and September, 1870, they never held a single meeting, except that in September, 1868, to consider their claim for back profits from the Warner well. (Id. 28.)

A part of the allegation we are considering is, that the defendant, in his intercourse with the other stockholders, did not claim to have purchased on his sole account.

The answer alleges, that he invited the other stockholders to join him in the ownership by paying a proportion of his debt. A more distinct assertion of ownership could not be made.

The evidence shows that he made this offer to some of the stockholders, and also to strangers, and that he announced that he would not admit the old stockholders who were delinquent. See depositions of defendant, and J. C. Marbury, (Deft's dep's.) The fact of the offer is admitted by Colt. (plff's dep., p. 21), and by Stabler (p. 30), except that the latter thinks it was made when deed of trust was given. But Colt says it was after the sale, and he mentioned it to Stabler (p. 47), and

even Hough (p. 45) will not swear that such an offer was not made, but only can't recall it. He states elsewhere, that his other operations in oil were so much more important than his Twin Lick interest, that anything relating to the latter he gave very little attention to. (Plfft's dep., p. 44.)

But a conclusive fact on this head remains. The company had contracted to deliver oil to certain parties. In August, 1867, Stabler, as Secretary and Treasurer, addressed a letter to defendant in relation to oil from the wells, to meet this contract. This letter is lost, but the reply to it is produced by Stabler. In it, the defendant says (p. 56):

"You seem to be under some misapprehension in regard to the wells *formerly the property of the Twin Lick Company. No new company has been formed, nor is it probable that one will be. The oil that has been pumped since I purchased, belongs to me.*" "*I can't let you have it unless you pay me* $3, *in the tank.* If you will become personally responsible for the payment to me of the amount, I will have it shipped."

Neither Stabler, nor any other member, took any exception to this assertion of title, *but Stabler bought the oil for the company from the defendant as owner*, as he admits (plfft's dep., p. 30), and as the defendant testifies, (deft't dep., p. 35.)

II.

Another charge is, that the defendant's official relations with the plaintiff, as Director, Secretary and Treasurer, gave him peculiar opportunities of knowing the business of the company, the value of the property, &c.

It is admitted that he was a director, at the time of sale, but he denies that he ever was Secretary or Treasurer.

The only evidence is Stabler's statement (p. 24, plfft's dep.) and a letter of Dr. Marbury, produed by him. Stabler says, "I ceased to be Treasurer in June, 1867." "Dr. Wm. Marbury succeeded me as Secretary and Treasurer, and held the office about a month or more."

Dr. Marbury, in his letter to Stabler of July 22, 1867, says, in speaking of a meeting which had been held:

"I tendered my resignation as Secretary and Treasurer, which was accepted, and O. Hough elected to fill the place, &c."

Stabler admits that he knows of no record of defendant's election; cannot even swear that he was elected; does not recollect that he ever notified him of his election; cannot say that the defendant knew of it, or that he ever acted as Secretary or Treasurer. (Id. p. 27.)

Dr. Marbury testifies (deft's dep., 87) that he never acted as Secretary or Treasurer; never had any books or papers; has no recollection of ever being notified of his election; in fact, knows nothing on the subject, except what his letter supplies, and presumes that what he therein calls a resignation, was, in fact, a declension of the office.

This is corroborated by J. C. Marbury, and further proved by Stabler's report, showing that he was Treasurer all the time.

Defendant is wholly uncontradicted, and makes it clear that if he was elected he never acted in those offices, and consequently had none of the advantages over others which the bill alleges in this connection.

It is said that he had peculiar means of knowing the business of the company and the value of the property, &c.

As a mere Director, he knew less of the business than the active managers, the President, Superintendent and

Treasurer; certainly not more than other members of the company.

As far as strangers were concerned, their limited knowledge was an advantage to the company, for the more they knew of its distresses the lower would their bids be.

As to his knowledge of the property, it appears that he never was on the property except twice before the sale, and then only transiently, and what he then learned was from the reports of others, shown since to have been incorrect. (See deft's dep.)

It was attempted to show that he was at the wells testing them for some time before the sale, by putting in evidence letters from Allen, Jackson and Harris, employees of the company, which speak of *Marbury* being there testing the wells, &c.; but besides that these letters, being hearsay are inadmissible, they do not speak of Dr. Marbury, and it turns out that it was *J. C. Marbury* who was there looking after the company's interest as their attorney. (p. 72.)

III.

It is charged the existence of the Warner well on the premises, *i. e.*, within the true lines of lease 26, was not made known at the sale, and that had it been made known it would have enhanced the price of the property.

This was for the simple reason that it was not known to any member of the company, or, as far as it appears, to any one else. It was an accidental discovery made more than a year after the sale. The whole matter is explained in the defendant's deposition. (p. 85, and seq.)

The parties were simply ignorant of the true boundaries of the lease that was sold.

But it clearly appears, from the testimony of the defendant and of Geo. Jackson, that a knowledge of the true boundaries must have injuriously affected the sale, because a correction of the lines would have thrown out the only producing well on lease 36, and although it would have brought in the Warner well, that would have been so near the boundary line, that by the terms of the lease it could not have been worked. (See dep., p. 99.)

But even were it otherwise, the facts were such as would not have affected the validity of the sale. Both parties were equally bound to know them, and there is no pretence of fraudulent concealment. In such case omission to disclose affords no ground of relief. See 1 Story's Eq. Jur., sec. 146, 150.

The defendant, by a new contract, secured the right to work the Warner well, but it has never since produced in paying quantities. (Dep., p. 86.)

IV.

It is charged that the defendant procured R. E. Colt to buy the property in for himself, which was a contrivance to avoid the appearance of purchasing for himself. No evidence has been offered on this point. The simple explanation of the matter is, that it might have prejudiced the sale for a member of the company to have bid, as it would look like by-bidding, and an attempt to run up the property, and would have deterred other parties from purchasing. To avoid this and procure the highest bid possible from others, the defendant kept in the back ground, altho' he did bid once. As Lord Eldon said in Fox vs. McReth (White and Ludor's leading cases in Equity): "If persons who are trustees at public auction to sell an estate, are there professedly as bidders to buy, there is a discouragement to others to bid."

V.

It is charged that the defendant directed and controlled the sale.

In fact, nothing could be fairer than the course of the defendant from the beginning. The bill seems to insinuate that the loan was a sort of volunteered thing, and a contrivance to get control of the property. The proof is, that the loan was made with great reluctance and distrust. (Deft's dep. pp. 70, 71.) Some of the Directors offered to become personally responsible, as an inducement to make the loan. (Plff's dep. p. 28, Deft's dep. p. 73.)

When the note matured, the defendant gave the company every opportunity to save the property. He wrote to Stabler, the Secretary, on the 23d April, saying that if the parties interested would join in a note for the amount due, or make any arrangement by which the responsibility would be divided, he would not foreclose. (p. 56 of Record.)

When he applied to the President, the latter informed him that the company had no money, and he did not know when or where they could get the money, and that his only chance of repayment was by selling under the deed of trust. (Deft's dep. pp. 71, 82, Plff's dep. p. 47.)

The defendant then called upon the trustee, in writing, to proceed under the deed. The latter arranged the terms of sale with J. C. Marbury, the attorney of the company (p. 72), with the knowledge and consent of the President of that Company.

The company at this time were perfectly bankrupt. (See Stabler's letters, and deps. for defendant.)

It was perfectly well known to the company that the property was advertised for sale, and it was acquiesced in. (p. 72). They even took advantage of the fact, as

against other creditors, as we find Stabler writing to Jackson, the Superintendent at the wells, on the 19th of June, 1867, to notify parties undertaking to sue, that there is a mortgage on the property, and referring them to the *Parkersburg Times*, one of the papers in which the sale was advertised. (p. 57 of Record.)

Moreover, J. C. Marbury was appointed by the board specially to go out some ten days before, and remain there till the sale *and look after their interests, and see that the sale was properly conducted*, for which he was paid $100. (See dep., pp. 72, 82.)

It was well known to the directors, before the sale, that the defendant might bid, and no objection was made to it. (Plfft's dep., p. 29.) (Deft's dep., p. 82.)

At the same time the defendant did not wish the property, and would have preferred to have it sold to another person, and only intended to bid to protect himself. (Dep., pp. 42, 73.) Which is further proved by the fact, that on the ground, immediately after the sale, he proposed to others to join him and share the risk of working the property

The company's attorney had been on the ground preparing for the sale and trying to make the best show for ten days before sale. (p. 72.)

The sale was conducted *in the presence of the company's attorney, J. C. Marbury, George Jackson, their superintendent* (p. 72), and oil men from the neighborhood, all of whom were familiar with the property; whereas the *defendant had arrived on the ground only an hour before the sale* and had no familiarity with it. The company's attorney made by-bids to run up the property. (p. 72.)

The property sold for more than its value. (See Stiles & Thomas' depositions.)

After the sale no concealment was used, or any attempt

made to take advantage of the company, but the defendant *offered the members of the company*, exclusive of those who had not paid assessments and had thereby forfeited their stock, *the privilege of joining him in the formation of a new company on the basis of his debt, that is, each person to have an interest proportioned to the amount paid by him towards the satisfaction of the debt.* This was, in substance, an offer to allow them to redeem the mortgage; for they were bound, in any event, to pay the debt before they could derive anything from the property. And this offer, as we have seen, was declined.

The investment was so unprofitable, that after two years of time, labor and expenditure, the defendant was advised by Jackson, then his superintendent, to abandon the property unless a change should occur very soon. (Deft's dep., p. 99.) The defendant had spent about *three thousand five hundred dollars* on the property before he discovered the light oil. (p. 86.)

Now contrast all this with the course of the plaintiffs. After using the defendant's money, refusing to pay it, and driving him to a foreclosure, they allow him to spend over three years, and a large amount of money in developing the property, exercising exclusive control over it without a suspicion that his title is to be questioned, abandoning his profession in order to give his time and labor to this work, and after he has had the whole risk of ruinous loss, and his labor and means have made the well productive, they then, for the first time, wake up from a sleep of over three years and claim a share in the profits. So much for the evidence.

A fact, not to be lost sight of, explains every seeming ambiguity in the acts and language of the defendant, after the sale, relied on by the other side.

After the sale he made an offer to the other stockholders to admit them into his purchase, upon payment of a

proportionate part of his debt. Until he was satisfied of their final determination not to join him, his purchase was, in a certain sense, provisional, i. e. it was open to be treated as on joint account (pp. 73, 83 of Record), but about a month after the sale, when he was satisfied that he was to be left alone in his enterprise, he writes to Stabler, as already shewn (p. 56): "You seem to be under some misapprehension in regard to the wells *formerly the property of the Twin Lick Co. No new company has been formed, nor is it probable one will be. The oil that has been pumped since I purchased, belongs to me,*" *&c.* From that time, at least, there was a distinct assertion of exclusive ownership.

It is made apparent that there was no fraud practised on even the individual stockholders.

But, we repeat, that the evidence in reference to them is wholly inapplicable to the case of the complainant itself—the Twin Lick Company.

It is not pretended that any promises or representations were made to the corporation itself, which would make an express trust in its favor or make the defendant's action an express fraud against it. It is not pretended that the *corporation* ever offered or expected to share in the burdens of the defendant's enterprise, or ever asserted title to a share of its profits, until this suit was brought,—nearly four years after its property was bought by defendant.

VI.

The complainant then has nothing to rely upon except the supposed rule of Equity which, on grounds of policy, would forbid a director of a corporation from purchasing at a sale of its property.

As a general rule, it is admitted, that a Director of a

Corporation occupies the relation, to it, of a trustee, and cannot buy its property at a public sale, because his duty as such trustee is to promote a sale at the highest price, and his interest as a purchaser would be in conflict with this duty.

But a mere shareholder is under no such disability, and *when a director becomes a creditor*, he is, *as to his debt*, in as good a position as any other creditor, whether a mere stockholder or a stranger. Otherwise, Directors, who are most interested in sustaining the corporation, could not lend it money in extremity, without greater risk, than a stranger, of losing it. Any other creditor would be entitled at a foreclosure sale to buy in mortgaged property to protect himself from loss, and a director must have the same privilege. In this case, if the defendant hadn ot done so, the property would have been sold to a stranger for less than half the defendant's claim upon it.

See Angel & Ames on Corporations, sec. 233, and cases cited.

Stratton vs. Allen, 16 N. J., 220.

A corporation executed bonds, with warrants of attorney to confess judgment, to a director, a creditor, and judgments were accordingly entered. The corporation being afterwards declared insolvent, its Receiver filed a bill to set aside the judgments, partly on the ground that the defendant was a director.

The Chancellor said: "*The mere fact that the creditor was a director does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation to make contracts with it, like any other individual; and when the contract is made, the director stands, as to the contract, in the relation of a stranger to the corporation.*"

Gordon vs. Preston, 1 Watts, 385, was a feigned issue

to try the validity of a mortgage by a Bridge Company to the *President* and *Treasurer*.

Gibson, Ch. J. said, "That a corporator may sustain the relation of debtor or creditor in regard to the corporation, and *in the latter receive security*, is a proposition which requires not the aid of argument."

R. R. Co. vs. Cloghorn, 1 Speer's Eq. 546. On distribution of proceeds of property of a corporation, directors who were indorsers, secured by mortgage, held entitled to priority.

Cur. "Now there is nothing, either in law or equity, which forbids a member, or *even a Director* of a corporation *from contracting with it*, and, like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject."

In Buell vs. Buckingham, 16 Iowa, 284, a private sale of corporate property by the Directors to one of their own members, who was creditor, in satisfaction of his debt, was sustained.

See, also, the strong language used, in city and county of St. Louis vs. Alexander, 23 Missouri, 483, 528.

See, also, Merrick vs. Peru Coal Co., 61 Ill. 478.

The cases which assert the disqualification of the director to purchase, are either cases in which he was not a creditor, or cases of express fraud, in which he become a creditor for the express object of forcing sales of property at a sacrifice, and becoming the owner for his own gain.

VII.

On the facts hereinbefore referred to, it will be maintained that if the complainant ever had any claim to relief, it is now barred by acquiescence and laches. ✕

The rule is thus stated in Kerr on Fraud and Mistake, (Amer. Edn), p. 201. "But as soon as a man, with

✕ Badger v. Badger 2 Wall 87, 94.
Wardwood v. R. R. Co. 17 Wall. 78. 81.
Marsh v. Whitmore 21 Wall. 178. 184.

full knowledge, or, at least, with sufficient notice or means of knowledge of his rights, and of all the material circumstances of the case freely and advisedly does any thing which amounts to a recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property or incur expenses, under the belief that the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction originally impeachable becomes unimpeachable in Equity."

In Vigers vs. Pike, 8 Cl. and Fin. (Amer. Edn.) 650, which was a bill filed by a company to set aside a purchase made by their agent.

Ld. Cottonham said:

"The doctrine of carrying equities by acquiescence, I consider to be one of the most important to be attended to." "A man who, with full knowledge of his case, does not complain, but deals with his opponent as if he had no case against him, builds up from day to day a wall of protection for such opponent, which will probably defeat any future attack upon him."

In Wentworth v. Lloyd, 32 Beavan, 467; it appeared that the plaintiff's agent, at a sale of his property, became a purchaser jointly with others who knew of his agency, in 1853. In 1859, the plaintiff filed his bill to set aside the sale. The master of the rolls said: "The defendants unite in one defence, viz: that the plaintiff was from the beginning of the transaction and throughout, and has continued down to the present time, cognizant of the interest his agent took in the purchase, and that he has never complained of this until after the lapse of several years, when the property in question has be-

come much more valuable than could have been anticipated, at the time of the transaction itself. *This, if established, would unquestionably constitute an effectual bar to the plaintiff's obtaining any relief in respect of sale or ever questioning its validity.*" And the bill was dismissed.

Follansbee v. Kilbreth, 17 Ill., 522.

An agent, employed to purchase, took the title in his own name. *Three years* afterwards the principal filed his bill to establish a trust in his favor.

The Court says: They (the complainants), could not * * * * * come in after three years' silence and acquiescence, and revive their claim and seize upon a speculation, which, in the meantime, had become inviting, by a rise in the property, which they did not anticipate." "If they kept silence, when Equity required them to speak, they cannot be allowed to speak when Equity requires them to keep silent."

Wade vs. Pettibone, 11 Ohio, 57.

The defendant was employed as solicitor by the plaintiff to foreclose. He bought at the mortgage sale in his own name. He offered to relinquish to plaintiff or buy at a certain price; no communication passed between the parties for two years and four months, when the defendant had to pay the balance of purchase money and then claimed the property as his own. Soon after this a bill was filed to charge him as trustee.

By the Court. "The phase, therefore, which the case assumes, is not as to the existence of the original right, but whether it has not been lost by delay. This long slumber, this unaccountable and inexcusable neglect of duties seems to the court a sufficient answer to a plaintiff who is seeking in chancery to assert rights."

Cowell vs. Watts, 19 L. J., Ch. 455.

In May, 1843, A. and B. agreed to become jointly in-

terested in certain lands for a building speculation. The lease was taken in B's name, and they continued in joint occupation until July, 1843, when B assumed exclusive possession. He carried on building operations at his own risk and expense, and A never asserted title until January, 1845, *eighteen months* after the cause of action accrued. The bill was dismissed for laches.

See also Banks vs. Judah, 8 Conn., 145.

But the nature of the property involved in this case is peculiar. It is purely *speculative, subject to constant risks and fluctuations*, and specially demanding diligence in the assertion of any claims upon it.

All this is recognized in the legislation of the State of West Virginia. An Act of February 27th, 1871, entitled, "An Act to provide for the inspection of oil wells, and the protection of oil producers," declares, sec. 5th, that "any person or persons in the peaceable possession of land leased for the purpose of operating for oil or minerals under the sale, assignment or transfer of a lease heretofore made, and who have continuously remained in such possession, and have bored for oil and operated for minerals, and in good faith expended money in such boring and operating, *for the space of three years*, shall not be disturbed in their right of possession by reason of any defect or informality in such sale, transfer or assignment."

Another act, Statutes of W. Va. of 1872–3, p. 152, makes *such possession a bar to any action at law or in Equity to establish title to, or possession of the lease, or to recover the profits received from it.*

The courts fully recognize the distinction between this kind of case and others.

Clegg vs. Edmonson, 8 De Gex, Macnaghton & Gordon, 787.

The managing partners of a firm, having a lease of a mine, expiring September 29th, 1846, gave notice of dissolution in July, 1846, and in August applied to the landlord for a new lease in their own names, which was given in December. The other partners claimed an interest in it, but did not file any bill until 1855.

The Court said: "The authorities fully warrant us in saying that the rules which govern in cases of direct trust, *and apply to property of an ordinary character*, are not equally applicable to cases of constructive trust, *and of property of the description we have here to deal with.*" "*If the mines had led to ruinous expenditure and been unproductive nothing would*, of course, have been heard of the claim of the plaintiffs." "Are they then entitled to reap the benefit where they could not have been subjected to the loss?" "A mine which a man works is in the nature of a trade carried on by him." "In such cases, a man having a claim in Equity on the ground of constructive trust should pursue it promptly." "He should show himself, *in good time, willing to participate in possible loss*, as well as profits, not play a game in which he alone risks nothing."

Walford vs. Adie, 5 Hare, 122.

Bill to establish constructive trust.

Cur. "The general rule is sound which imposes on parties engaged in a fluctuating business of this kind (coal mining), the necessity of being prompt in stating what their intentions are in such a case as this."

Prendergast vs. Turton, 1 Young and Coll.

Plaintiffs' shares in a mining concern had been forfeited in 1828 for not paying certain illegal assessments. In 1838, they filed a bill claiming a share in the profits made.

Cur. "*This is a mineral property, exposed to hazard,*

fluctuation and contingencies, requiring a large outlay and producing perhaps a considerable profit in one year, and losing it the next. *It requires, perhaps, more than any other business, the parties interested in it to be vigilant and active in asserting their rights.*" "They (plaintiffs) could not now claim the profits when they had not shared the difficulties, risk and expense. They could not now be admitted as members of the company, after having acted as if they had abandoned it."

To the same effect, see cases of Norway vs. Rowe, 19 Vesey, 144.

Earnest vs. Vivian, 33 L. J., Ch. 513.

Ashurst's appeal, 60 Penn. St. R. 290.

DAVIDGE AND COX,
of Counsel for Appellee.

Dec 9. 75 Rec'd

In the Supreme Court of the United States.

OCTOBER TERM, 1869.

TWIN LICK OIL CO., *Appellant*,
vs.
MARBURY.
No. 69.

Review of Authorities Cited by the Defendant upon the Point of the Right of the Appellee to Contract with the Company.

Brief, p. 21, cites Angell & Ames on Corporation, Sec. 233 and cases there cited as authority for the position that "when a director becomes a creditor he is, as to his debt, in as good a position as any other creditor, whether a mere stockholder or a stranger."

Nothing equivalent to this is found in the place cited. The writers say: "And though the member of the corporation be also one of the trustees, it would seem that this would not incapacitate him from continuing with it, but he may recover against the corporation for his services rendered." Three cases are cited in support of this proposition—all from the same court in Vermont. Two were cases where the trustees of religious societies contracted with their own associates to do work on the building (18 and 19 Vermont)—for work done and materials furnished; the other case was that of trustees of a school district making a similar contract. (6 Vermont.) The court

said that in the last-mentioned cause the question of public policy did not arise.

The other case cited by Angell & Ames is from 14 E. L. & E.

The writers notice a British statute by virtue of which the making of a contract by a director with the company, vacates his office, and the case cited decides that the statute vacates the office, but does not render the contract void.

These are all the cases that Angell & Ames have to cite in support of the doctrine so faintly enunciated, that *it seems* trustees of corporations may contract with their corporation.

16 Iowa, 284, Buell *vs.* Buckingham.

In this case the *entire stock was owned by the three persons*, one was president and the two others were directors of the company. These three persons sold land of the company to the president in satisfaction of a debt due him. A stranger, a judgment creditor of the company, attempted to levy upon the land after the sale, claiming that the sale was void. *Held* that the sale was not void, but voidable only, and that only at the election of the *cestui que trust*, and that as all the stockholders assented to the purchase by one of them, it was a valid purchase.

61 Illinois. 478, Merrick *vs.* Peru Coal Co.

This was an action at law by plaintiff, being the endorsee and holder of two certain promissory notes against the maker the Peru Coal Co. The notes were signed by the president of the company for the time being, one being the plaintiff and the other his brother.

The defence was—

1. That the notes were issued without authority, as the brothers were bound to furnish capital, and—

2. That the plaintiff, a director, could not become the

creditor of the company by purchasing its paper. The court, upon all the facts, held that (1) the brothers were not bound to furnish capital, and (2) the plaintiff was not incapacitated to buy the paper of the company and become its creditor.

The plaintiff was proven to have said *repeatedly* that the company owed him nothing. The court said these declarations were made in ignorance of his legal rights, and should not be concluded by them. P. 480.

1 Watts, 385, Gordon *vs.* Preston.

This was an attempt by a judgment creditor to submit to the payment of his debt, land that had been mortgaged by the company to its president and treasurer to secure a debt. The court (C. J. Gibson) said, "the validity of this mortgage is unquestioned by the corporation even at this day although its existence has all along been known to the corporate officers, whose duty it was to disown it had there been an interest to contest it. *The corporation then being satisfied with it, who has a right to object to it?* P. 387.

23 Missouri, 483, St. Louis *vs.* Alexander.

"The strong language" referred to in appellees as "used" in the case, p. 528, was the language of one of the judges and is not found in the opinion of the court, pp. 507 to 522.

In that opinion nothing is found respecting the rights of directors to contract with a company. And that language goes no further than to sustain the validity of contracts by directors with their companies.

1 Speers, Equity, 546, 562, R. R. Co. *vs.* Cloghorn.

The boat of a steamboat company being attached by a creditor of the company, and sale ordered, it was found to be mortgaged to one of the directors of the steamboat company, who filed his bill to prevent the sacrifice of the boat at forced sale, and to have his debt first paid. Held: the mortgage was valid.

As to acquiescence.

8 Clarke *v.* Finnelly, 650, Vigers *vs.* Pike.

The langnage of Lord Cottenham in that case announces a well established principle of equity; but in what case was it applied? A party who had been for several years in possession of a mining property, working it, and appropriating the proceeds, being sued for the royalty by the executor of the lessor, who had died in the meantime set up by cross-bill in defence, fraudulent misrepresentation by the lessor in making the lease. Lord Cottenham, after using the language cited in the brief, proceeds to apply it to the case, and says, in the very next sentence: "I think the plaintiff, the company, have not stated or proved such a case as entitles them to repudiate the acts complained of and to have them rescinded as against Lord Audley or his estate; and that as parties to these transactions, and cognizant of the facts during the time they were acting upon the arrangement now complained of, *using and appropriating* the property they derived under it, they, as a company, are precluded from asking any relief to which they might otherwise have been entitled."

Wentworth *vs.* Lord, 32 Beavan, 467:

A sale by an agent who took a beneficial interest in the purchase. The Master of the Rolls said "*prima facie* all that a plaintiff has to do in such a case is to prove the fact of the agency of the defendant, and the fact that he was beneficially interested in the sale made. This the plaintiff has done beyond all doubt or question; he has also as clearly proven that all the co-purchasers were aware both of the agency of Mcrt and his interest in the purchase. The burthen then falls on the defendants to prove how they can justify or maintain such purchase. P, 471.

"The burthen of proof to establish that Mr. Wentworth

knew of the fact of Mort's interest lies with the defendant's, and the question is, have they satisfied that obligagation? P. 473.

The burthen of proof lies in the defendants to prove distinct information to the plaintiff and acquiescence by him after such information given." * * * In my opinion the defendants have discharged the objection so laid on them, and they have proved, though he may afterwards have forgotten it, that distinct information was given to the plaintiffs *at the time* of the fact that Mort was one of the beneficial purchasers of the moiety sold by the plaintiff, and on that the plaintiff has acquiesced in that fact, by not taking any steps to contest the sale for six years after it was accomplished." Mem.: The rise and value was by the discovery of gold in Australia, and took place three months after the sale. P. 473, par. 1.

Stratton *vs.* Allen, 16 N. Y., (Eq.) (1 C. E. Green,) page 220.

The chancellor expressly says, at page 235, that his conduct in taking the judgment was not only in violation of the policy of the statute, but was an abuse of his official character as trustee, which rendered the judgment in his favor fraudulent and void as against creditors. I deem it unnecessary to express any opinion.

5 Hare, 122, Walford *vs.* Adis:

Defendant, one of the management, sold his shares to the company, and thereafter ceased to interfere in their affairs. The shareholders generally knew of the purchase for three years prior to the filing of the bill, and remained in possession of the shares and continued the business, then filed a bill to set aside the sale as fraudulent and to compel the defendant to contribute on account of his said shares.

The Vice-Chancellor said this was a mining partnership,

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and the defendant "retired from that partnership by selling his shares to the company, and he has since lost all the privileges of a partner, including that of being served with notice of and taking part in its proceedings." (P. 117.) "Everything was done openly, and the whole transaction was entered in the books of the concern." (P. 116.) Sale was in 1835; bill filed 1841. "His sale of shares to the company and everything connected with that sale, including the registration of the shares, was open and undisguised, and his place on the committee was filled at next meeting." P. 118.

8 De Gex, 787, McNaughten *vs.* Gordon:

In this case the managing partners were not trustees, and had not taken the property of the complainants. The bill sought to make them trustees of a property acquired by them from other parties, not from the complainants.

The Lord Justice, Turner, said: "We have to deal in this case not with a direct but with a constructive trust." P. 807.

Lord Justice Knight Bruce said: "The trust, however, by which I assume James Collinge to have been effected as to the lease, was what the lawyers call a construction trust—not one declared or expressedand; there are some considerations applicable to the former that are inapplicable to the latter, as various authorities show." P. 811.

Stubbs *vs.* Lister, 1 Younge *vs.* Collier, 97:

Joint stock company for mining. Plaintiffs refused to pay assessments, and stock forfeited in July, 1828. In 1836 company remodeled. Bill filed in 1838 for share of property. *Held:* too late.

"Here is a mineral property, the subject of great uncertainty and fluctuation. After its character has been established with much difficulty, after a period of nine years, during which they rendered no assistance to the concern,

a claim is now brought forward by those who are now willing to share in its prosperity." Bill dismissed, but still the vice-chancellor said he thought it a case fit to be submitted to the chancellor. P. 112.

Banks *vs.* Judah, 8 Conn., 145:

Resolution by directors to sell out the whole concern, and that stockholders might purchase. Sold and purhased by Raymond for the benefit of all who might come in within certain time; this made known to the plaintiff, and he declined; a new company organized. Ten years later he filed his bill. Held, barred by acquiescence only; no doubt the sale was voidable.

Follansbee *vs.* Kilbreth, 17 Ill., 522:

Defendant purchased land for plaintiff and took deed in his own name, paying the first installment out of the plaintiff's money, but giving his own obligations for the residue. Plaintiff was at first satisfied, but on examination dissatisfied; refused, though called on, to pay the remaining installments, though notified by defendant to do so, "or forever thereafter hold his peace." "The defendant was left to pay the purchase money with his own funds." P. 525. This in 1846. In 1852 plaintiff tendered the purchase money and filed his bill. Held, too late.

Wade *vs.* Pettibone, 11 Ohio, 57:

Purchased by the attorney of an execution creditor.

In November, 1836: attorney wrote informing of his purchase and offering creditor the benefit. Creditor replied, he would examine and determine. In August, 1839, creditor filed his bill against the attorney. Held, too late, right lost by "this long slumber; this unaccountable and inexcusable neglect of duties."

"Lane, C. J.: To prevent this collision of interest; to de-

stroy the temptation of abusing opportunity for obtaining personal advantages at the expense of confidentinl obligations, by sacrificing interests which he is bound to protect, the law imposes upon those who stand in fiduciary relations the disability of acquiring interests inconsistent with such relation. It does inquire whether the act was honest or advantageous; but gives the protected party all the advantage of the act done. This doctrine is universally applicable to trustees, executors, and agents," &c. P. 60.

Cowell *vs.* Watts, 19 L. J., 455:

C. and W. agreed to take a lease of land and to build on it, C. being the "monied partner." Lease was taken in his name, lessor refusing to lease to C. This, in the spring of 1843. C. did nothing. W. went on at his sole expense to build. In January, 1845, C. claims an interest, and files his bill in August, 1845. Held, too late.

Feb 28 - 1-874 Motion to Dismiss
Submitted

Denied

Supreme Court, United States.

1875,-6. No. 658.

ROBERT B. BOLLING,
Plaintiff in Error,
AGAINST
GUSTAVUS LERSNER,
Defendant in Error.

Suggestion of points, thought important, on motion to dismiss for want of jurisdiction—filed according to leave granted February 14, 1876.

CONWAY ROBINSON,
Counsel for Plaintiff in Error.

FEBRUARY 22, 1876.

R. O. POLKINHORN, Printer, Washington, D. C.

Supreme Court, United States.

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It is as true now as it was in 1797, that the court must "take care that it neither *abandons a jurisdiction rightfully belonging to it*, nor usurps that which does not." 4 Dall. 337.

If in this suit there is "drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution" "of the United States, and the decision is in favor of their validity,"—or if in this suit "any title, right, privilege or immunity is claimed under the Constitution," "and the decision is against the title, right, privilege or immunity specially set up or claimed," "under such Constitution," then all must agree that jurisdiction rightfully belongs to this court, and it must take care that the same is not abandoned.

That in this suit "a title, right, privilege or immunity is claimed under the Constitution" of the United States;—and that there is "drawn in question the validity of a statute of" and "an authority exercised under" a "state on the ground of their being repugnant to the Constitution,"—is plainly shown in the parts of the record referred to, and relied upon, in the printed argument (of Jan. 1, 1876), for plaintiff in error.

That one of the instances mentioned in that printed argument, p. 21 to 24, is not noticed in the opinion delivered in this court, may be owing, perhaps, to the large amount of business of this court, or, perhaps, to its supposing that, in that instance, no federal question was presented to the highest court of the State for determination, or if presented, that its decision was not necessarily involved in the decree as rendered. But it is respectfully submitted that it is a mistake so to suppose.

The present Constitution of Virginia—sometimes called the Underwood Constitution—contemplates (in art. 6, § 2) "that the assent of a majority of the" *five* "judges elected to the Supreme Court of Appeals" "shall be required, in order to declare any law null and void by reason of its repugnance to the Federal Constitution or to the Constitution of this State." Notwithstanding the act of February 28, 1872 (Sess. acts, pp. 98, 99), to provide a special Court of Appeals of *three* circuit judges, the Supreme Court of Appeals has, since the views taken, on pages 83, 84, and page 3 of the record, recognized (p. 268 of the record) that "it was not contemplated nor intended that cases involving a question of *constitutionality* of a law shall be referred for decision to a special Court of Appeals." Yet this case (wherein the order of *W. Willoughby* allowing the appeal involved a question as to the constitutionality of certain acts of Congress and of the State Legislature, and a question as

to the validity of the order allowing the appeal) was, by an order of the Supreme Court of Appeals, made the 19 of April, 1872 (p. 27 to 29 of record), *without the knowledge of, or notice to, the now plaintiff in error or his counsel*, certified, with forty-nine others, to the Special Court of Appeals; and as shown by the record and stated on pages 11 and 12 of the printed argument for plaintiff in error, the term of the Supreme Court of Appeals ending immediately after that order of the 19th of April, 1872, there was no opportunity of making, during the term, objections to such transfer; and they were made in the vacation of that court to the judges thereof, *more than four months* before the decision of the special court. (p. 85 of record, et seq.) Yet the judges of the Supreme Court of Appeals instead of taking steps, as asked (p. 91 of record), to set aside the order certifying the case to the special court, and to require that court from further proceedings to surcease, left that court to make such decree as was made on the 27th of Jan., 1873 (pp. 29, 30 of record).

It was truly said (p. 116 of record) before the Circuit Court of Fauquier, as well as before the highest court of the State, that "the character of the cause would have been made known—the objection to a transfer of it from the Supreme Court would have been stated, if there had been opportunity of doing so." But there was no such opportunity, and owing to the want of it there was improvidently made that order of the 19 of April, 1872, for the removal of the cause which, in its consequences, has produced far greater injury than any done to *James Bagg* by the order for his removal from office in the reign of James the First. Yet then even Bagg's offensive words and indecent manner did not prevent the court of King's Bench from manifesting its respect for the great principle of *magna charta;* and it appearing that the pro-

ceeding was, without hearing him answer or without reasonable warning, such removal was held absolutely "*void.*" *Bagg's* case, 11 Rep. 99*a*, cited in *The King* v. *Gaskin*, 8 T. R. 210, and in 6 Rob. Pract. tit. 5, pp. 625, 626.

There not having been an opportunity of stating the objections to the removal of the cause, this court may not now know all that would have been stated had the opportunity of stating them been afforded. But the court can see from the opinion of the Supreme Court of Appeals (p. 268 of the record) that "it was not contemplated nor intended that cases involving a question of constitutionality of a law should be referred for a decision to a special court of appeals," "and that in certifying cases to the special court for decision, of course the Supreme Court would certify none which was known to involve a constitutional question." And this court is authorized to conclude—and, in view of what appears on page 92 of the record, is bound to conclude—that the counsel for the plaintiff in error, if the opportunity had been afforded to him, would have made known to the Supreme Court of Appeals that a constitutional question was involved in this case; and that upon its being so made known, this case would not have been certified to the special Court of Appeals; and that court, not having the case before it, never could have made the decree that was made by it on the 27th of January, 1873. (pp. 29, 30 of record.)

Now, on behalf of the plaintiff in error, it is insisted that he is not to be deprived of his freehold by means of that decree of the special Court of Appeals, which could never have been made if there had been due process of law; and there is drawn in question the validity of the statute of the State, of February 28, 1872, or of the authority exercised under the State, on the ground of their

being repugnant to the Constitution of the United States. It is specially set up and claimed that, under colour of that statute, and by and through the order of the 19th of April, 1872, (pp. 27, 28 of the record)—*made without the knowledge of, or notice to, the plaintiff* in error or his counsel,—made *without his being heard or having opportunity of being heard*—there was such an exercise of authority as violates a title, right, privilege and immunity, protected by that Constitution: it is specially set up and claimed that, under colour of that statute and the authority exercised under it, the plaintiff in error will, if the decree that has been made be allowed to operate, be *deprived of property without due process of law*, in violation of the fourteenth amendment to the Constitution of the United States. And the decision of the highest court of the State is in favour of the validity of the statute and of the authority exercised under it, and is against the title, right, privilege and immunity specially set up and claimed under the Constitution. That court, admitting (p. 270 of record) "that no opportunity was afforded the appellant to object to such transfer or show cause against it, rests its decision on the ground that the act of Assembly made no provision for affording such opportunity." This ground may, when the case is to be finally decided, be shown to be insufficient. (7 Rob. Prac., tit. 1, § 7, p. 23 *et seq.*) On the present question—one merely as to *jurisdiction*—it is enough to see that the decision is against the title, right, privilege and immunity specially set up and claimed under the fourteenth amendment: the jurisdiction of this court is none the less because of the particular department of the State government which may have been instrumental in depriving a person of property without due process of law; the fourteenth amendment applying to an act of the State through any department of its government.

II. From what has already been said, it seems sufficiently plain that the plaintiff in error was in no default in not arguing before the three circuit judges a question of *constitutionality*. He had a right to present every such question to a tribunal *competent* to pass upon it; he had a right in his petition to the highest court of the State for an appeal to raise and present for its consideration every question of *constitutionality* that is raised and presented therein. According to the opinion of this court, he "presented to the court for its determination the question of the constitutionality of the reconstruction acts;" and "this was a federal question."

On the part of the plaintiff in error it is insisted that the record shows that every federal question presented to the Supreme Court of Appeals "was decided, or that its decision was necessary to the determination of the cause:" it is insisted that its decree necessarily involves a decision against every title, right, privilege or immunity which by the petition of appeal was specially set up or claimed under the Constitution.

Its *decision* does not involve that which the highest court of the State (p. 266) supposes might have been argued, but which it says it does *not* decide; and therefore it seems altogether useless to enquire as to the effect "*if* it was held that the objection to the authority of the judge came too late;" the record showing that there is no ground for such '*if*.'

Here the copy of the opinion (pp. 265 to 277) is something more than a compliance with the amendment to the 8th rule. The decree stating on its face that it is "for reasons stated in writing and filed with the record," the opinion, which states these reasons and is copied at the foot of the decree, may properly be regarded as a part of the record and looked at in connection with the decree to ascertain what the decision is. By this opinion

it appears that the Supreme Court of Appeals of Virginia, upon the objection that *W. Willoughby* had no authority to allow an appeal in the case, held (p. 266) "that the said appeal was a valid appeal according to the law of this State, as it has been settled by this court in the cases of *Griffin's Ex'or* v. *Cunningham*, 20 Grat., 1, and *Quinn, &c.*, v. *Com.*, Id., 138;" and, in confirming the decision in those two cases, they add that "In *Teel, &c.*, v. *Young*, 23 Grat., 691, it was held that the act of March 5th, 1870, commonly called the enabling act, is a valid act," except a certain proviso.

A lover of constitutional republican government, who, upon his admission to the bar of this court, thirty-seven years ago took an oath to support the Constitution of the United States—and has never viewed that oath as an empty form—may, it is hoped, be pardoned for thinking that, under that Constitution and the laws made in pursuance thereof, this court may, in the present case, exercise "a jurisdiction rightfully belonging to it," notwithstanding the three cases just mentioned, and notwithstanding the four cited in the opinion delivered from the bench of this court.

Such jurisdiction may and should be exercised because, according to the course of decision of this court—which until the delivery of the opinion in the present case has been constant—such jurisdiction exists whenever the decree made by the highest court of the State involves a decision against that which is specially set up and claimed under the Constitution of the United States and the laws made in pursuance thereof; and the decree now in question involves such decision just as much—as necessarily—as it was involved in many cases which have been considered by this court, and in which its jurisdiction was sustained.

At December T., 1865, where the defendant in the

court below relied solely on the fact that he was marshal, and that court refused to instruct the jury that the defence was sufficient, this court had no doubt that the case came within the 25th section of the judiciary act: it considered it enough that "the defendant *claimed* the protection of 'an authority exercised under the United States,' and the decision was *against the protection* thus *claimed;* or, in other words, against the validity of that authority, as a protection to him in that action;" and, distinguishing between the question of *jurisdiction* and that which is finally to be decided, it added: "Whether the authority which he then set up was valid to protect him, is a question for this court to decide finally." *Buck* v. *Colbath*, 3 Wallace, 336, 340.

At Dec. T., 1866, it was enough that the question was necessarily decided "against the *claim set up* by plaintiff in error under the constitutional provision." *Green* v. *Van Busk*, 5 Wallace, 314. As in respect to the proceedings there in question, the court below "decided against the effect which Green *claimed* for them, this court had jurisdiction." S. C., 7 Id., 145. This decision has been followed. *Crapo* v. *Kelly*, 16 Wallace, 620.

At Dec. T., 1868, where "the judgment of the Court of Appeals of New York denied the relief *upon the ground* that certificates of indebtedness were not entitled to exemption," the circumstance that the State court had rested its decision upon that ground did not deprive this court of jurisdiction to review that decision, it being "clear that in the case before the State court a right, privilege or immunity was claimed under the Constitution or a statute of the United States, and that the decision was against the right, privilege or immunity claimed." *The Banks* v. *The Mayor*, 7 Wallace, 22. In another case, at the same term, the court considered it

enough that "some one of the questions embraced in the 25th section of the judiciary act was relied on by the party who brings the cause here, and" that "*the right he claimed* it gave him *was denied* to him by the State court." *Furman* v. *Nichol*, 8 Wallace, 56.

The jurisdiction of this court was nowise impaired at Dec. T., 1872, by the circumstance that the State court supposed the Constitution of the United States did not in any manner affect the matter in controversy. *Railroads* v. *Richmond*, 15 Wallace, 6. Nor was it at all impaired at Oct. T., 1874, by the circumstance that a majority of the State court placed their judgment on another ground than that under the Constitution, that other ground being insufficient to avoid the necessity of passing on the constitutional question. *Railroad Co.* v. *Maryland*, 20 Wallace, 644; S. C., 21 Id., 457.

These authorities seem in point upon the question of jurisdiction in the present case.

Although in *Griffin's Ex'or* v. *Cunningham* some of the judges were of opinion that acts done by the military appointees called judges were valid as acts of judges *de facto*, (20 Grat., 42, 82,) and although *W. Willoughby* was one of those military appointees, and had the reputation of being for a time a judge under such military appointment, and did in fact act in the office of judge, yet it is specially set up and claimed (Rec., p. 31. pp. 102 to 110, pp. 2, 3, and pp. 9, 10) that the act done by him in this suit as judge was not valid, but was as void as the acts which were done in Kentucky in 1825 by Messrs. *Berry*, *Haggin*, *Trimble* and *Davidge* as judges, and which were adjudged void, in 1829, in *Hildreth's Heirs* v. *McIntire's Devisee*. 1 J. J. Mar., 206, cited in 7 Rob. Pract., ch. 1, § 3, p. 39; and against such act of *W. Willoughby* "title, right, privilege or immunity is claimed under the Constitution."

Although in *Griffin's exor.* v. *Cunningham*, other judges not concurring in the view as to the military appointees being judges *de facto* (20 Grat. 65 and 89) sustained the act of March 5, 1870, called the enabling act (Sess. acts of 1869,–'70, ch. 18, § 1, 2, pp. 16, 17,) so far as they deemed the same constitutional (20 Grat. 76), yet in this suit it is specially set up and claimed (Rec. p. 110 to 112, and p. 3) that the order of the 17 of May, 1869, (allowing the appeal) being then null and void continued to be null and void, and the decree theretofore made on the 13th of September, 1867, (Rec. p. 264) remains binding, notwithstanding the subsequent act of March 5, 1870; it is specially set up and claimed that this act of March 5, 1870, and the authority exercised under it in respect to this suit, are repugnant to the Constitution of the United States; and against the same, title, right, privilege and immunity, are specially set up and claimed under the Constitution, and especially under the fourteenth amendment thereto.

Therefore, in respect to each federal question raised and presented in the petition of appeal, the decree that has been made is necessarily a decision against what is so specially set up and claimed; and this court has jurisdiction. There is no occasion now to consider the question as to the validity of the grounds on which it is so specially set up and claimed. When the proper time shall arrive for the consideration thereof by this court, it will be shown that even in England, the effect of the mere '*acting as judges*' falls far short of what some seem to suppose. *Rogers* v. *Wood*, *&c.*, 2 Barn. & Adol. 245, 22 Eng. C. L. (cited in 7 Rob. Pract. Ch. 1, § 3, p. 38;) and it will be shown that in the United States, in respect to acts of such men as *W. Willoughby* and his associates, "the direct denial of their jurisdiction or authority, before the final adjudication of any case by the party over

whom they claim to exercise jurisdiction, whether it be by plea or exception on any cause of error upon the record, is one of the direct and constitutional modes provided for the protection of private rights against legislative or executive aggression." *The People* v. *White*, 24 Wend. 568; and it will further be shown that what is contended for in the present case is in accordance with what has been adjudged in this court. *Hickman* v. *Jones*, 9 Wallace, 201.

It seems almost superflous to add that according to the views now suggested, *jurisdiction* of the present case is not affected by the four cases last cited in the opinion. For not only is there a great difference between the question of *jurisdiction* and the question that is to be finally decided but there may, upon the final decision as to the validity of acts of the Government of the United States, be a great difference between its acts in time of war and its acts in time of peace; especially acts in time of peace in a State whose State government was, after the close of the war, and before such acts, recognized as valid by the legislative and executive departments of the Government of the United States, and has also been *adjudged valid by this court.* (Rec. p. 104 to 106.)

By reason of the shortness of the time that *military* appointees acted in the State of Virginia as judges of its *civil* courts, and by reason also of the operation of statutes of limitation, the exercise of such jurisdiction as is invoked on behalf of the plaintiff in error, may, in respect to past transactions avail few, if any besides him. But this case may, as a precedent, be of the deepest importance in the future, to the whole country, both North and South. Its value will be appreciated and felt throughout this land, if the decision thereof, besides doing what

is right in the present case, shall conduce to show to all, at home or abroad, who take an interest in the institutions of our fathers, that the judicial department of the United States, will, so far as in its power lies, support that which is proper, and refuse aid, countenance, or encouragement, to that which is improper, in a government that all good citizens desire shall act so as to be rightly esteemed constitutional and republican.

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FEBRUARY 22, 1876.